

1957

Present : H. N. G. Fernando, J.

M. A. JARAKI, Petitioner, and T. GOONETILLEKE (Inspector of Police, C. I. D.), Respondent

S. C. 488—Application for Bail in M. C. Colombo 46,461/A

Bail—Non-cognizable offence—Power of Court to remand accused—Criminal Procedure Code, ss. 33 (2), 129 (1), 239, 394, 396—Exchange Control Act, No. 24 of 1953, s. 51 (6).

A person accused of committing a non-cognizable offence cannot be detained in custody under the provisions of section 33 (2) of the Criminal Procedure Code unless there is some proof of acts of preparation by him for imminent departure from Ceylon or of intention so to depart.

APPLICATION for bail.

E. F. N. Gratiaen, Q.C., with *C. S. Barr Kumarakulasinghe* and *T. W. Rajaratnam*, for the petitioner.

D. St. C. B. Jansze, Q.C., with *J. W. Subasinghe*, Crown Counsel, for the respondent.

Cur. adv. vult.

November 12, 1957. H. N. G. FERNANDO, J.—

The petitioner is stated to be the holder of a Syrian Republic Passport who arrived in Ceylon in July 1957. The circumstances in which he seeks release from remand ordered by the learned Chief Magistrate of Colombo have to be referred to in some detail.

According to the affidavit of one Goonetilleke (Inspector of Police, Colombo), who is the respondent to this application, he obtained an order under section 129 (1) of the Criminal Procedure Code to investigate

certain non-cognizable offences alleged to have been committed against the Exchange Control Act, No. 24 of 1953, by a person whom I will refer to as the first suspect. In the course of the investigation the Inspector arrested the petitioner on 24th August 1957 having "reason to believe that the petitioner had no permanent residence in the Island and that he was about to leave the Island". Thereafter, according to the affidavit, the Inspector produced the petitioner before the Chief Magistrate of Colombo who, on an application purporting to be made under section 33 (2) of the Criminal Procedure Code, ordered the petitioner to be remanded till 20th September 1957. The record of the proceedings in the Magistrate's Court shows that on subsequent occasions also the Magistrate, acting under section 33 (2) of the Code, ordered the remand of the petitioner, the first suspect and another person referred to as the second suspect. While in custody in pursuance of these orders, the petitioner moved the Magistrate to be released on bail, but his applications were refused, and on 3rd October 1957 the present application under section 396 of the Criminal Procedure Code was made to this Court. At that time no action had yet been taken under section 148 of the Code. But before the application was listed for argument in this Court, to wit on the 19th October 1957, a report was filed under section 148 (1) (b) alleging the commission by the first two suspects and the present petitioner of certain offences under the Exchange Control Act in connection with an alleged attempt to take away from Ceylon a large amount in foreign currency. The charges against the present petitioner were of conspiracy and abetment. On 25th October another application was made to the Magistrate for bail and was refused "for the same reasons already given". Having regard to previous orders the reason for keeping the petitioner on remand is that the Magistrate was satisfied that he should be remanded under section 33 (2) of the Criminal Procedure Code pending the trial of this case. A further remand until 19th November 1957 was ordered on the 1st November after the charges had been read over. The case is now fixed for inquiry under Chapter XVI of the Criminal Procedure Code because there is special provision in the Exchange Control Act (section 51 (6)) empowering a Magistrate to take non-summary proceedings. It will be seen that although the question of remanding the petitioner or of releasing him on bail during the course of the inquiry could have been determined under section 289 of the Code, the authority for the remand both prior to the filing of the application to this Court and at the present stage has been section 33.

It was contended on behalf of the petitioner that he was taken into custody some days prior to his being produced for the first time before the Magistrate and that therefore the several orders made under section 33 (2) were irregular. It is not necessary to resolve the questions of fact and of law involved in this contention since the jurisdiction of this Court has now been invoked with a view to obtaining an order under section 396. The question whether or not the orders of remand hitherto made by the Magistrate are valid is not directly involved in this application.

The principal matter argued was that the conditions specified in section 33 (2) are not satisfied, and that that section should therefore not be utilised in relation to the petitioner.

It is not denied that the petitioner has no permanent residence in the Island and if, therefore, the other condition specified in section 33 (2) is satisfied there would be a discretion to remand the petitioner until his trial. The other condition is that a peace officer has reason to believe that the petitioner is about to leave the Island. The words "reason to believe" have been construed in a similar context in the case of *Litten v. Perera*¹, where it was held that for the Court to see "reason to believe" there must be evidence upon which to found the belief. Although section 33 (2) does not expressly refer to the Court "having reason to believe", I think it is clear that a Magistrate would not act under that section unless there is evidence that a person is about to leave the Island. The grounds for this belief though not stated in any of the orders of the Magistrate can be culled from the documents filed of record in both Courts. They appear to be the following :—

- (1) The first suspect is alleged to have been detected while about to emplane for Singapore on 22nd August in the act of attempting to smuggle foreign currency out of Ceylon, and it is alleged that he had with him at the time a cheque on a New York Bank drawn by the petitioner with whom he had made contact during his stay of twenty-four hours in Ceylon.
- (2) It is alleged that there is evidence to support the charges of conspiracy and abetment of the offence of smuggling the currency out of Ceylon.
- (3) Since the charges, if proved, will render the petitioner liable to imprisonment as well as to an exceptionally heavy fine, he would naturally be most anxious to evade trial.
- (4) The petitioner is an extremely rich man and would have the means to abscond even forfeiting any large sum which he may deposit if released on bail.
- (5) The petitioner had on his person when arrested a visa valid until 31st October and an open air travel ticket.

The learned Acting Attorney-General has argued that the matters I have enumerated prove not only that the petitioner was about to leave Ceylon when arrested in August, but also that he is at the moment about to leave Ceylon. Indeed he expressed his personal opinion that the petitioner will in all probability abscond if given the opportunity by being released on bail. In seeking to ascertain whether section 33 (2) of the Code is applicable, the difficulty I encounter is that the section requires evidence that the petitioner is about to leave Ceylon, and not merely the existence of circumstances which indicate the probability of his desire to leave Ceylon. Any individual, citizen or foreigner, guilty or innocent, would naturally be anxious to avoid rather than to face a trial; but does that justify the inference that his anxiety would in all probability induce him to abscond from justice if given the opportunity? Such an inference must involve the assumption, in disregard of the presumption of innocence, that he is guilty of the offence charged. The fact that the petitioner was in possession of an "open" air travel ticket does not in my

¹ (1908) 11 N. L. R. 94.

opinion assist the prosecution : such a ticket would normally be held by many a visitor to a foreign country who has paid for his passage home but is uncertain of the date of his return. In any event the prosecution does not deny that the petitioner's air ticket *and* his passport have been impounded by some official authority.

The reasonable construction of section 33 (2) is that there must be some proof of acts of preparation for imminent departure or of intention so to depart, and the material made available to this Court falls short of constituting such proof in relation to the petitioner. If the provisions of section 33 (2) are inadequate to meet a situation which arises owing to the enactment of new currency restrictions with huge penalties and to the new facilities alleged to be provided by air travel, the remedy does not lie within the powers of the Court.

The Attorney-General did not argue that section 289 of the Code would be available although non-summary proceedings have now commenced. Bearing in mind that the offences with which the petitioner is charged are bailable, I do not on the available facts, particularly in view of the provisions of section 394, consider that a remand under section 289 would be justifiable. The order I now make should not however be taken to preclude a future remand under that section or even under section 33 (2) on new or adequate material. I should add that in view of the opinion I have formed I propose to act under section 394.

In accordance with the suggestion made by Counsel for the appellant, the bail will consist of the deposit of a sum of money. Having regard to the provisions of section 51 of the Exchange Control Act I consider a sum of Rs. 15,000 to be reasonable.

I direct the Magistrate to release the petitioner from custody if he deposits a sum of Rs. 15,000 hypothecated by a bond conditioned for his appearance at the inquiry pending in the Magistrate's Court.

Application allowed.