

NITHYANANTHAN AND OTHERS
v.
ATTORNEY-GENERAL

COURT OF APPEAL

H. A. G. DE SILVA, J., B. E. DE SILVA, J. AND SIVA SELLIAH, J.

C. A. APPLICATIONS 482/82, 483/82, 491/83, 492/83 and 496/83

H. C. COLOMBO 1198, 1199, of 1983.

JUNE 15, 1983.

Criminal Law — Bail pending trial under Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 — Jurisdiction — Section 2A of Criminal Procedure (Special Provisions) Act No. 15 of 1978 (amended by Act No. 54 of 1980) — Section 404 of the Code of Criminal Procedure Act — Sections 15(2) of the Prevention of Terrorism (Temporary Provisions) Act, as amended by Act No. 10 of 1982.

A prerequisite for the Appeal Court to exercise its power under section 404 of the Code of Criminal Procedure Act is the existence of an order of an original court whether it be the Magistrate's Court or High Court either allowing or refusing bail or fixing a sum as security which is reviewable by the Court of Appeal. Where the original court has no jurisdiction to grant bail to persons charged with offences under the Prevention of Terrorism (Temporary Provisions) Act pending trial the appellate powers of the Court of Appeal cannot be invoked.

Section 404 can have no application to offences under the Prevention of Terrorism Act as they are not only merely non-bailable ; the original courts are specifically barred from granting bail pending trial.

Case referred to :

(1) *In re Ganapathipillai* 21 NLR 490-492.

APPLICATION for bail

Bala Tampoe with *S.C. Chandrasanan, I. Xavier* and *Sirinivasam* for petitioner in Application No. 363/83.

Bala Tampoe with *S. Mahenthiran, K. Aravindan, A. Kirupaidasan* and *R. Selvaskandan* for petitioner in Application No. 482/8/28.

Bala Tampoe with *S. Mahenthiran, I. Xavier, K. Aravindan, A. Kirupaidasan* and *R. Selvaskandan* for petitioner in Application No. 483/81.

Bala Tampoe with *S.C. Chandrasanan, I. Xavier* and *Sivapadakumar* for petitioner in Application No. 491/83 and 492/83.

Bala Tampoe with *S.C. Chandrasanan, I. Xavier* and *Sivapadakumar* for petitioner in Application No. 496/83.

G. L. M. de Silva, S.S.C. with *K. Kumarasiri, S.C.* for Attorney-General.

01 JULY, 1983

H. A. G. DE SILVA, J.

The above applications were consolidated and argued before us, and we make order thereon as follows :—

The Petitioners in these applications have been at sometime taken into custody by the security forces. At a subsequent state all of them have been served with detention orders under the provisions of the Prevention of Terrorism (Temporary Provisions) Act no. 48 of 1979. In February 1982, all of them were served with indictments charging them with offences under the Prevention of Terrorism (Temporary Provisions) Act, and are now on remand on orders of the High Court of Colombo.

In all these applications, the Petitioners severally seek that they be released on bail pending their trial.

Learned Senior State Counsel on behalf of the Respondent has taken two preliminary objections to the hearing of these applications. The first was that this Court had no jurisdiction to entertain these applications under Section 2A of the Criminal Procedure (Special Provisions) Act No. 15 of 1978 as amended by Act No. 54 of 1980. The second objection was that a person remanded by the High Court, pending trial, for an offence under the Prevention of Terrorism (Temporary Provisions) Act has no right to be released on bail.

In regard to the first objection, learned Senior State Counsel points out to the fact that all the applications for bail which are being dealt with in this Order are captioned: "In the matter of an application for Bail under Section 2(A) of the Criminal Procedure (Special Provisions) Act No. 15 of 1978 as amended by Act No. 24 of 1979 and No. 54 of 1980".

Section 2A of the Criminal Procedure (Special Provisions) Act as amended by Act No. 54 of 1980 states that —

"notwithstanding anything to the contrary in any other law, a person referred to in paragraph (a) of Section 2

shall not be admitted to bail by the Court of Appeal other than in exceptional circumstances.”

Paragraph (a) of Section 2 states that —

“Every Court before which any person surrenders himself or is produced on arrest on an allegation that he has committed or has been concerned in committing, or is suspected to have committed or to have been concerned in committing, an offence set out in the First Schedule hereto shall keep such person on remand until the conclusion of the trial.”

A perusal of the First Schedule as amended, shows that offences under the Prevention of Terrorism (Temporary Provisions) Act are not included therein. Therefore an application for bail under Section 2A of the Criminal Procedure (Special Provisions) Act No. 15 of 1979 as amended by Act No. 25 of 1979 and 54 of 1980 will not be available in the case of a person charged for an offence under the Prevention of Terrorism (Temporary Provisions) Act seeking bail.

Learned Counsel for the Petitioners conceded at the hearing that invocation of the provisions of the Criminal Procedure (Special Provisions) Act was not relevant to these applications.

As regards the second objection taken by the learned Senior State Counsel, it was submitted that nowhere in the Prevention of Terrorism (Temporary Provisions) Act, has provision been made for persons accused of offences under that Act to be released on bail pending trial.

Section 7(1) of this Act deals with remand orders to be made by a Magistrate, when a person arrested under Section 6(1) is produced before him, directing that such person be remanded until the conclusion of his trial except where the Attorney-General consents to his release from custody. Sub-section (2) thereof enjoins the Court before which a person convicted with or concerned in or reasonably suspected to be connected with or

concerned in the commission of any offence under the Act, appears or is produced other than in the manner referred to in sub-section (1), to order the remand of such person until the conclusion of the trial.

Section 15(2) of the Act as amended by Act No. 10 of 1982 states that —

“Upon the indictment being received in the High Court against any person in respect of any offence under this Act, or any offence to which the provisions of Section 23 shall apply the Court shall in every case, order to remand any such person until the conclusion of the trial.”

It would be under this provision that the Petitioners are now being held in remand after service of indictment and pending trial.

Section 19 of this Act, the marginal note of which states — “Provisions of any written law relating to the grant of bail not to apply to persons accused of any offence under this Act” enacts as follows :—

“Notwithstanding the provisions of any other written law —

- (a) every person convicted by any court of any offence under this Act shall, notwithstanding that he has lodged a petition of appeal against his conviction or the sentence imposed on him be kept on remand until the determination of the appeal ;
- (b) any order made under the provision of sub-section (4) of section 14 shall, notwithstanding any appeal made against such order, continue in force until the determination of such appeal ;

Provided however, that the Court of Appeal may in exceptional circumstances release on bail any such person referred to in paragraph (a) subject to such conditions as the Court of Appeal

may deem fit, or vary or suspend any order referred to in paragraph (b).”

The learned Senior State Counsel submitted that no Court, whatsoever, has been given the power by the Prevention of Terrorism (Temporary Provisions) Act to enlarge on bail pending trial any person whose trial on indictment is pending before the High Court, while in the case of a person convicted of an offence under the Act the Court of Appeal has been given by the proviso to Section 19, the power, he submits is a special power or jurisdiction conferred on the Court of Appeal by the provisions of this Act. In this connection he referred to Article 138 of the Constitution. He submitted that the jurisdiction of the Court consists of the appellate, revisionary etc. jurisdiction conferred on it by paragraph (1) of that Article and the appellate and original jurisdiction which may be vested in it by Parliament, and referred to paragraph (2) of that Article. It was his submission that the jurisdiction to release on bail conferred on the Court of Appeal by Section 2A of the Criminal Procedure (Special Provisions) Act 15 of 1978 as amended by Act No. 54 of 1980, as well as that jurisdiction referred to in the proviso to Section 19 of the Prevention of Terrorism (Temporary Provisions) Act, fell within the original jurisdiction referred to in paragraph (2) of Article 138 of the Constitution. A similar jurisdiction had been conferred on the Court of Appeal, he submitted, by Section 10 of the Offensive Weapons Act No. 18 of 1966 which makes offences under that Act non-bailable except on orders of the Appeal Court. Since the High Court that would try the offences with which the Petitioners were charged had no jurisdiction to release on bail, any person charged with such an offence under the Prevention of Terrorism (Temporary Provisions) Act whether pending trial or after conviction, the question of invoking the appellate jurisdiction of the Court of Appeal did not arise.

Learned Counsel for the Petitioners submitted that this Court had a general or unrestricted jurisdiction conferred on it by Section 404 of the Code of Criminal Procedure Act No. 15 of 1979. The marginal note of this Section is as follows :— “Bail not

to be excessive and the Court of Appeal may admit to bail in any case while the Section itself 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 any other law the Court of Appeal may in any case direct that any person in custody be admitted to bail fixed by the High Court, or Magistrate be reduced or increased, or that any person enlarged on bail by a Judge of the High Court or Magistrate to be remanded to custody.”

Learned Counsel further submitted that the requirement of exceptional circumstances to be present for the Court of Appeal to grant bail as is contemplated by Section 2A of the Criminal Procedure (Special Provisions) Act as amended and by the proviso to Section 19 of the Prevention of Terrorism (Temporary Provisions) Act were restrictions placed by those statutes on the unrestricted power to grant bail in all cases given by Section 404 of the Code of Criminal Procedure Act to the Court of Appeal. If this contention is correct that Section 404 of the Code of Criminal Procedure Act gives an unrestricted power to the Court of Appeal to release on bail in all cases, what was then the necessity for the special jurisdiction to grant bail in cases of offences under the Offensive Weapons Act to be given to the Court of Appeal by Section 10 of the Offensive Weapons Act ?

He also contended that the general power that the High Court has to enlarge on bail persons charged before it on indictment, had been expressly taken away by Section 15(2) of the Prevention of Terrorism (Temporary Provisions) act as amended by Act No. 10 of 1982. This fact does not in our view affect the powers of the Court of Appeal which are the ones under consideration in this Order.

Learned Senior State Counsel in our view correctly contended that the power given to the Court of Appeal by Section 404 is an appellate power and that a prerequisite for its exercise is the existence of an order of an original Court whether it be the Magistrate's Court or the High Court either allowing or refusing bail or fixing a sum of security which is reviewable by the Court of Appeal. Therefore, since the original Court, and in this case, the High Court, has no jurisdiction to grant bail to persons charged with offences under the Prevention of Terrorism (Temporary Provisions) Act, pending trial, the powers of the Court of Appeal under Section 404 of the Code of Criminal Procedure Act cannot be invoked.

In *re Ganapathipillai* (1) which dealt with Section 396 of the Criminal Procedure Code (Cap. 20) now repealed, which was the Section corresponding to Section 404 of the Code of Criminal Procedure Act, at page 491 De Sampayo, J. states—

“Mr. Elliot further cited the English case of the Queen v. Spilsbury. There the English Court held they had jurisdiction because under the common law the Court had power to make orders for bail in all cases. But in Ceylon, the Supreme Court has no such power. Its power and jurisdiction are regulated by Statute, namely, either the Courts Ordinance or the Criminal Procedure Code. It is for this reason that Mr. Elliot so strongly relies on Section 396 of the Criminal Procedure Code.”

Dias A.J. in his judgment in the same case in pages 491 and 492 says :—

“..... and Mr. Elliot who very ably argued his case, relied upon Section 396 of the Criminal Procedure Code and contended that this Court had power in any case to admit a person to bail. The two previous Sections of this Chapter refer to the granting of bail by Magistrates in case of bailable offences and in cases of non-bailable offences, and Section 396 confers power on the

Supreme Court in any case to direct that a person be admitted to bail, or that the bail required by the Magistrate to be reduced or increased. Clearly that expression "In any case" can only refer to the cases referred to in the two previous Sections, and is not of general application."

While Section 396 of the Criminal Procedure Code (Cap. 20) corresponds to Section 404 of the Code of Criminal Procedure Act, the corresponding provisions to Sections 394 and 395 of the Criminal Procedure Code are Sections 402 and 403 respectively of the Code of Criminal Procedure Act. Section 402 deals with the granting of bail in bailable offences and Section 403 deals with circumstances when bail may be granted in cases of non-bailable offences. As far as the offences under the Prevention of Terrorism (Temporary Provisions) Act are concerned they are not merely non-bailable, the original Courts have been specifically barred from granting bail. Therefore Section 404 can have no application, in any event, to offences under the Prevention of Terrorism (Temporary Provisions) Act.

The learned Senior State Counsel finally submitted that taking into account the preamble to the Prevention of Terrorism (Temporary Provisions) Act and the scheme of the Act and particularly Section 28 of the Act which states that the provisions of that Act are to prevail over other written law, Parliament has by necessary implication taken away from the Court of Appeal any appellate jurisdiction it would have had to review an order regarding bail given by an original Court as all original Courts including the High Court have been expressly or by necessary implication been deprived of their jurisdiction to grant bail for offences under that Act. Neither has the Prevention of Terrorism (Temporary Provisions) Act specifically given the power to the Court of Appeal, whether in exceptional circumstances or not, to grant bail pending trial.

We are of the view that both objections taken by the Senior State Counsel to the hearing of these applications are entitled to succeed and we would therefore dismiss all these applications.

B. E. DE SILVA, J. — I agree.

SIVA SELIAH, J. — I agree.

Applications dismissed.