

DACHCHAINI
VS
THE ATTORNEY-GENERAL

COURT OF APPEAL
BALAPATABENDI, J
EKANAYAKE, J.
SRISKANDRAJAH, J
CA PHC 55/2005 (D.B.)
H. C. COLOMBO 9300/98
OCTOBER 06, 2005

Bail Act, No. 30 of 1997, Section 2, - Section 20 - Earlier Legislation - Court of Criminal Appeal Ordinance 23 of 1938 - Section 15(1) Administration of Justice Law 44 of 1975 - Code of Criminal Procedure Act, No. 15 of 1979 - Compared - Guiding principles in the implementation of the provisions of Bail Act - Rule and the exception - Policy changes - Exceptional Circumstances requirement - No more a principle? - Constitution - Article 138(1). Offences against Public Property Act, No. 12 of 1982 - Poison, Opium and Dangerous Drugs (Amendment) Act, No. 13 of 1984 - Bribery (Amendment) Act, No. 20 of 1994 - Comparison.

The petitioner sought to revise the Order of the High Court Judge refusing to enlarge the accused on the basis that she has not made out any exceptional circumstances.

HELD:

- i. The Bail Act, No. 30 of 1997 which came into operation on 28th November, 1997 is the applicable law.

- ii. By the enactment of the Bail Act the policy in granting bail has undergone a major change. The rule is the grant of bail. The Rule upholds the values endorsed in human freedom. The exception is the refusal of bail and reasons should be given when refusing bail.

Per **SRISKANDRAJAH, J.**

"By the enactment of the Bail Act there is a major change in the legislative policy and the Courts are bound to give effect to this policy. The High Court judge in the impugned Order has erred in not taking into consideration the policy change that has been brought in by the enactment and mechanically applied the principle that the accused have failed to show exceptional circumstances when this requirement is no more a principle governing bail pending appeal."

APPLICATION for bail form a judgment of the High Court of Colombo.

CASES REFERRED TO :

1. *King vs Keerala*, 48 NLR 202
2. *Rex vs Cooray*, 51 NLR 360
3. *Queen V Cornelis Silva* 71 NLR II
4. *Salahudeen vs Attorney-General*, 77 NLR 262
5. *Rama Thamotheerampillai vs Attorney-General*, SC Application 141/75
6. *Q vs Liyanage*, 65 NLR 289
7. *Jayanthi Silva and two others V Attorney General 1997 3 Sri LR 117*
8. *Queen Vs Rupasinghe Perera* 62 NLR 236
9. *Anuruddha Ratwatte and four Others vs Attorney-General*, SC Application 2.2003-TAB SCM 11.7.2003.
10. *Ward vs James* (1965) 1 ALL ER 563 at 571
11. *Addaraarachchige Samson vs Attorney-General*, CA (PHC) 10/98 High Court Colombo Case No. 7710/96, CAM 19.5.1988.
12. *P. G. Pieiris (Ex. Chairman, Village Committee) vs Chairman, Village Committee (Medasiya Pattu, Matale)* 62 NLR 546.
13. *Herath vs Munasinghe*, SC 634 MC Kegalle 16388, SCM 27.8.1957.

Cur. adv. vult.

28.10.2005

SRISKANDARAJAH, J.

The Petitioner in this application has sought to revise the Order of the learned High Court Judge of Colombo dated 11.01.2005 refusing to enlarge

the 1st, 2nd and 3rd Accused Appellants on bail and for an order to enlarge the 3rd Accused Appellant on Bail.

The 1st, 2nd, and 3rd Accused were indicted in the High Court of Colombo on four counts viz.

1. 1st, 2nd and 3rd Accused for aiding, abetting and conspiring, to commit an offence of cheating.
2. 2nd Accused for cheating by promising to send a person abroad.
3. 1st Accused for cheating in a sum of Rs. 200,000/-.
4. 3rd Accused for cheating in a sum of Rs. 55,000/-.

The 2nd Accused did not appear in court and the trial proceeded in absentia against the 2nd Accused. After trial all the accused were convicted for the aforesaid offences and sentenced to 7 years imprisonment for each count and in addition a fine of Rs. 10,000/- was also imposed on each of them. The accused preferred an appeal against their conviction and sentence.

Pending Appeal an application was made to the High Court of Colombo to release these three accused on bail and this application was refused by the learned High Court Judge in the impugned order dated 11.01.2005. The refusal of bail to the 1st and 3rd accused is on the basis that "these accused have failed to show any exceptional circumstance that is required to consider bail" and the refusal of bail to the 2nd accused is on the basis that "there is no provision to consider bail in respect of the 2nd accused prior to surrendering to court."

As this is a Revision Application this Court has to consider the legality of this order.

The bail pending appeal is now being granted under the provisions of the Bail Act, No. 30 of 1997. But the case law that had been developed in this area was based on different procedural laws that were in existence before the Bail Act came into operation. Therefore it is necessary to consider the legislative history and the evolution of law in this area.

In 1938 the provisions of bail pending appeal was incorporated in the Court of Criminal Appeal Ordinance No. 23 of 1938 in Section 15(1). This section provides:

15(1) The Court of Criminal Appeal may, if they think fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal.

Under this section the court had discretion to enlarge an accused on bail pending appeal. But the courts when acting under this section had evolved certain restrictions on the exercise of this discretion. The courts have adopted a principle that the bail should not be granted as a rule but it can only be granted in exceptional circumstances. In 1942 Wijeyewardene J in the case of *King vs Keerala*⁽¹⁾ referring to a judgment in 25 Criminal Appeal Reports 167 in deciding an application of bail pending appeal held that "this court does not grant application for bail in the absence of exceptional circumstances". In 1950 *Windham J in Rex vs. Cooray*⁽²⁾ when releasing the suspect on bail applied the same principle. In 1969 in the case of *The Queen vs Cornelis Silva*⁽³⁾ Justice Weeramantry held "It is a settled principle that release on bail pending appeal to the Court of Criminal Appeal will only be granted in exceptional circumstances. I do not think the circumstances urged are sufficient to make the petitioner's case an exceptional one." Similar view was expressed by *Samarawickrama J in Salahudeen vs Attorney General*⁽⁴⁾.

In 1973 The Court of Criminal Appeal Ordinance No. 23 of 1938 was repealed by Administration of Justice Law, No. 44 of 1973. In *Ramu Thamotheerampillai vs A. G*⁽⁵⁾, the counsel for the petitioner argued that in view of the new provision in the grant of bail pending appeal i. e. Section 325 (2) the principle that the grant of bail could only be granted in exceptional circumstances cannot be applied. Vythialingam 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 and held :

"that the granting of bail is now vested in the court as I have pointed out, by the Administration of Justice Law and other relevant enactments as the case may be. This court is vested with a wide discretion to grant or refuse bail by Section 325(3) with which we are now concerned. But this discretion must be exercised judicially and not arbitrarily or

capriciously. In *Queen vs. Liyanage*⁽⁶⁾ the court pointed out at pages 292 and 293. **But it is not to be thought that the grant of bail should be the rule and the refusal of bail should be the exception** where serious non-bailable offences of this court are concerned." (emphasis added).

The policy enumerated above was considered as the guiding principle of the courts even after the Administration of Justice Law, No. 44 of 1973 was enacted and the courts insisted on exceptional circumstances to the grant of bail.

The chapters dealing with appeal in the Administration of Justice Law was repealed in 1979 and the Code of Criminal Procedure Act, No. 15 of 1979 came in to operation. Justice D. P. S. Gunasekara President Court of appeal (as he then was) in *Jayanthi Silva and Two others vs Attorney General*⁽⁷⁾, reviewed the provisions of bail pending appeal. He observed, that as the law as it stands today under the provisions of the Code of Criminal Procedure Act the statute itself draws a distinction between the bail pending appeal from the order of the Magistrate Court and from the order of the High Court Sections 323(1) and 333(3). He further observed the words in Subsection (3) of section 333 clearly vest 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 appeal. The discretion to grant or refuse bail must be exercised judicially and not arbitrary or capriciously. He also observed that 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. Justice Gunasekara after analyzing the cases *King vs Keerata* (*Supra*), *Queen vs Rupasinga Perera*⁽⁸⁾, *Queen vs. Coranelis Silva* (*Supra*), *Salahudeen vs Attorney General* (*Supra*) and *Ramu Thamotheam Pillai vs. Attorney General* (*supra*) held : "that from the 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 applicant 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."

The Bail Act, No. 30 of 1997 which has come in to operation on the 28th of November 1997 is the law applicable at the relevant time of this application and at present. The long title of this act states as

"An Act to provide for release on bail of persons suspected or accused of being concerned in committing or of having committed an offence ; To provide for the granting of anticipatory bail and for matters connected therewith or incidental thereto." This act has provided for release on bail of persons at the stage of investigation, at the stage of trial, pending appeal and on anticipatory bail. Section 20(2) of the Bail Act provides for bail pending the determination of appeal against a conviction.

The provisions of bail pending appeal after conviction are similar under the Court of Criminal Appeal Ordinance [Section 15 (1)], the Administration of Justice Law [Section 325(3)], and the Code of Criminal Procedure Act [Section 333(3)] these sections have given a discretion to court to release an accused on bail. But when the Courts implementing these provisions had followed a principle that has evolved through judicial decisions that bail pending appeal from conviction would only be granted in exceptional circumstances. The Bail Act [Section 20(2)] also contains similar provisions in relation to bail pending appeal after conviction but the Bail Act draws a distinction by providing under Section 2 a guiding principle for the implementation of these provisions. Sarath N. Silva the Chief Justice in referring the legislative policy of the Bail Act in *Anuruddha Ratwatte and 4 others vs Attorney General*⁽⁹⁾ held, "That 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.""

Lord Denning MR in the case of *Ward vs. James*⁽¹¹⁾ 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 decision 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**" (emphasize added).

By the enactment of the Bail Act the policy in granting bail has under gone a major change. The Parliament in Section 2 of the Act has laid down the principle that should govern the grant of bail under the Bail Act. This section clearly spells out the fundamental principle which should

form part of the law of Sri Lanka. This principle has been articulated as follows: "The guiding principle in the implementation of the provisions of this Act shall be that the grant of bail shall be regarded as a rule and the refusal to grant bail as the exception." It is very important that we distinguish the rule from the exception, the rule is the grant of bail. The rule therefore, upholds the values anchored in human freedom. The exception is the refusal of bail, and reasons should be given when refusing bail.

On the other hand if the legislature had thought it fit in considering the long line of cases that exceptional circumstances is a prerequisite for the grant of bail pending appeal from a High Court it could well have incorporated this provisions in Section 20(2) of the Bail Act. Various enactments that were enacted in the recent past namely; Offences Against Public Property Act, No. 12 of 1982, Poison, Opium and Dangerous Drugs (Amendment) Act No. 13 of 1984, Bribery (Amendment) Act No. 20 of 1994 etc., have specific provisions that exceptional circumstances must be established in granting bail.

By the enactment of the Bail Act there is a major change in the legislative policy and the courts are bound to give effect to this policy. The learned High Court Judge of Colombo in the impugned order has erred in not taking into consideration the policy change that has been brought in by the enactment of the Bail Act and by mechanically applying the principle that the accused have failed to show any exceptional circumstances when this requirement is no more a principle governing the bail pending appeal. Therefore this court set aside the order of the learned High Court Judge dated 11.01.2005 in so far as it relates to the 3rd Accused Appellant since the 1st Accused Appellant has already been released on bail.

This court in exercising its powers under Article 138(1) of the Constitution proceeds to consider the merits of the application for bail to the 3rd Accused Appellant. The Court has discretion under Section 20(2) to release an accused on bail pending appeal after conviction. The Court must exercise

this discretion judicially. It is unwise to confine its exercise within narrow limits by rigid and inflexible rules. The decision must in each case depend on its own peculiar facts and circumstances. But in order that like cases may be decided alike and to ensure some uniformity in decisions it is necessary to lay down some guidance for the exercise of this discretion. In this regard the considerations that are enumerated by Justice D. P. S. Gunasekara in *Jayanthi Silva and Two Others vs Attorney-General* (supra) could be taken in to account in determining the question as to whether there are good reasons to refuse bail of an accused who has been convicted before a High Courts pending his appeal. They are nemely; the main consideration of course is whether if his appeal fails the appellant would appear in court to receive and serve the 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 grave), the likelihood of the appellant committing other offences. the likely hood of the appellant taking revenge on the witness 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 appeal, the chances of success or failure of the appeal, are some considerations that could be taken in to consideration to refuse the accused on bail pending appeal however they are not exhaustive.

In the instant case the 3rd accused is a 50 years old mother of three children. She was convicted in the 1st count for aiding, abetting and conspiring to commit an offence of cheating and was sentence to seven years imprisonment. She was also convicted in the 3rd count for committing an offence of cheating in a sum of Rs. 55,000/- and was sentenced to seven years. In addition a fine Rs. 10,000/- was also imposed. According to the Petitioner the husband of the accused is not living with her and she is the sole breadwineer of the family of three children in these circumstances the chances of absconding is remote. Considering the

facts and circumstances of this case this court is of the view that there is no reason to refuse bail to the 3rd Accused Appellant. Therefore this Court enlarges the 3rd Accused Appellant on bail in a sum of Rs. 50,000/- cash bail with two sureties of fixed abode and permanent employment in similar amounts.

JAGATH BALAPATABENDI, J

Having had the advantage of reading the Order of my brother Srisikandarajah, J. I agree with the conclusion he has reached that the 3rd Accused-Appellant should be released on bail.

It had been a settled principle that the release of an accused on bail pending appeal was granted only in "exceptional circumstances" (Vide (Supra) the decisions in cases, *King Vs. Keerala*, *Queen Vs. Rupasinghe* (Supra) , *Salahudeen Vs. Attorney General* (Supra) , *Jayanthi Silva Vs. Attorney General*, *Addaraarachige Samson Vs. Attorney General*⁽¹⁾).

Careful study of those cases reveals that the exceptional circumstances which had been considered by Court varied from case to case and there was no uniformity and certainty. Some Judges considered the fact that the long delay in hearing the appeal as an "exceptional circumstance" but some other Judges did not consider it as an "exceptional circumstance".

With the enactment of the Bail Act No. 30 of 1997 the law of bail became a static law. A clear guiding principle was laid down in respect of the grant of bail. Section 2 of the Bail Act states " **Subject to the exceptions as herein after provided for in this Act, the Guiding Principle in the implementation of the provisions of this act shall be, that the granting of bail shall be regarded as the rule and the refusal to grant bail as the exception**".

Also, the High Court has discretion under Section 20(2) to release an appellant on bail pending the determination of his appeal; it is only on valid reasons that the bail should be refused as construed by the L. C. Provisions of the Bail Act, No. 30 of 1997.

I have followed the principle that the appellant should be released on bail only on exceptional circumstances in few Bail Orders written by me after the enactment of the Bail Act.

In the case of *P. G. Peris (Ex- Chairman, Village Committee) Vs. Chairman Village Committee (Medasiya Pattu, Matale)*¹² H. N. G. Fernando J as he then was made the following observation; "The Magistrate relied on my unreported judgment in *Herath Vs. Munasinghe*¹³ when he overruled the objection that he had no power to impose a term of imprisonment in default of payment of the certified amount. I have hence held in identical circumstances that a default term of imprisonment may be imposed, and that sub section (1)e of the Criminal Procedure Code would determine the length of the term in such case. While it is disappointing to realize that my judgment was erroneous, I welcome the opportunity now given me to employ the language of Baron Bramwell in a similar situation. **"The matter does not appear to me now as it appears to have appeared to me before"**.

As stated above, though I have written those Bail Orders having considered the Principle that the appellant should be released on bail in exceptional circumstances after the enactment of the Bail Act No. 30 of 1997, I myself now disappointed in realizing that the principle adopted was incorrect. Thus, I too make use of the opportunity now given me to employ the language of Baron Bramwell :

"The matter does not appear to me now as it appears to have appeared to me before".

For the above mentioned reasons, I fully agree with the reasons given by my brother for his conclusion.

CHANDRA EKANAYAKE, J – I agree

Application allowed. Bail granted.