

RUPASENA AND ANOTHER
v.
HUSSAIN BABU AND OTHERS

COURT OF APPEAL
GUNASEKERA, J. (P/CA) AND
J. A. N. DE SILVA, J.
C.A. 111/97.
H.C. COLOMBO: HCBA 4107/96.
MARCH 19, 1997.

Code of Criminal Procedure Act – Sureties – Directed to deposit money in cash with 2 sureties acceptable to court – Default – Sureties remanded – Is it lawful – Section 422 of the Code of Criminal Procedure Act, 15 of 1979.

Held:

(1) There is no provision in law for the High Court Judge to remand sureties.

(2) It is to be noted the provisions with regard to failure of the sureties to fulfil their obligation have been set out in Section 422 of the Criminal Procedure Code. Upon the failure of the two sureties to produce the accused in court, the learned Trial Judge should have notified the sureties to show cause as to why the bond should not be cancelled.

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

D. S. Wijesinghe, P.C., with Manohara R. de Silva for petitioners.

A. H. M. D. Nawaz S.C., for Attorney-General.

Cur. adv. vult.

March 19, 1997.

GUNASEKERA, J. (P/CA)

This is an application for revision against the order of the Learned High Court Judge dated 10.02.1997 by which order the Learned High Court Judge has directed the two sureties of the original accused which sureties are the petitioners to this application to deposit a sum of Rs. 50,000/- in cash with two sureties acceptable to Court and made order, that in default of the deposit of the said bail that the petitioners be remanded.

Mr. D. S. Wijesinghe P.C., submits that the petitioners were on remand consequent to the said order of the Learned High Court Judge and contended that there is no provision in law for the Learned High Court Judge to have made the order remanding the sureties.

Mr. Nawaz, S.C. who appears for the Attorney-General concedes that there is no provision in law for the High Court Judge to have made the said order which is sought to be impugned in these proceedings. From the record which has been called for from the High Court and which has been produced before this Court by the Registrar, Mr. S. P. de Silva who is present in Court, it appears that in High Court bail application No. 4107/96 that the accused A. Harris Hussain Babu had been released on bail in a sum of Rs. 150,000/- in cash with two sureties subject to the conditions referred to in the order of the Learned High Court Judge dated 27.06.96. Consequent upon that order, by a bail bond dated 04.07.96 one Thahra Sheriff Mohamed Jusrin of Siyambalagaskotuwa, Pahamune had deposited a sum of Rs. 150,000/- and receipt No. 931123 of 04.07.96 has been issued. The two petitioners Rajapakse Pathiranage Don Rupasena of No. 109/9, Vinayalankara Mawatha, Colombo 10 and Sudath Senaka Hettiyakanda of No. 18, Udyana Road, Bambalapitiya have stood as sureties for the accused and executed a bond dated 04.07.96. On an examination of the said two bonds signed by the sureties it is to be observed that although the Learned High Court Judge by his order dated 27.06.96 has directed that the sureties should sign a cash bond for a sum of Rs. 150,000/-, the bond itself shows that the sureties had signed a personal bond.

On 13.11.96 the O.I.C. of the Narcotics Bureau had reported to Court that the accused who had been released on bail had violated the conditions of bail and failed to report as directed by the order of the Learned High Court Judge dated 27.06.96. On a consideration of the report of the O.I.C. of the Narcotics Bureau the Learned High Court Judge had issued a warrant on the accused and the sureties returnable on 27.11.96, (*vide* journal entry dated 13.11.96). On 27.11.96 the warrant had not been executed and neither the accused

nor the sureties had been produced. Thereupon the Learned High Court Judge had issued an open warrant on the accused and the sureties returnable on 20.01.97. In the meantime on 04.12.96 an Attorney-at-Law filed a motion on behalf of the sureties and had moved that the case be called in Open Court. The case has been called and the motion had been refused as it had not been supported. Thereafter on 06.12.96 another motion had been filed with notice to the Learned State Counsel by an Attorney-at-Law and moved that the case be called on that date. On that date the sureties had surrendered before the Court and an application had been made on behalf of the sureties for a week's time to produce the accused stating that they had information that the accused was somewhere in the Ragama area. The warrant on the sureties had been recalled and the sureties had been warned as the sureties failed to secure the attendance of the accused. They had been warned that on the next date that their bond for Rs. 150,000/- each would be cancelled in the event the accused was not produced. The case was fixed to be called on 16.12.96.

On 16.12.96 the sureties had been present and they had moved for a further date to secure the attendance of the accused. The Learned High Court Judge had directed the sureties to deposit security in a sum of Rs. 25,000/- each in cash with two acceptable sureties on their behalf and issued an open warrant on the accused. The case was fixed to be called again on 10.01.97. In consequence of this order it appears from the record that the two sureties had entered into two bonds dated 23.12.96 with Mohamadu Samoon Siyam of No. 555 Alabadagama, Pannala as surety and a sum of Rs. 50,000/- had been deposited and receipt No. 932492 of 16.12.96 had been issued. From the record it appears that some other surety bond dated 23.12.96 had been signed on behalf of the sureties Rajapakse Pathirana Don Rupasena and Sudath Senaka Hettiyakanda who were the petitioners and that Mahamed Samun Kaleel-ur-Rahaman and Abdul Sukoore Mohamed Maheer of Muhandiram Road, Colombo 3, and Pitiduwa Gamage Lalith Nihal and D. C. Chandrasena have signed as sureties. From the record it appears the O.I.C. Narcotics Bureau by his report dated 24.11.96 had notified the Registrar that the accused and the 1st surety

Rajapakse Pathirana Don Rupasena could not be apprehended. This report had not been journalised and it had come up on 27.11.96. On a consideration of the report the Learned High Court Judge without considering what had happened earlier, had re-issued warrant on the accused and the sureties and directed the case to be called on 20.01.97. On 04.12.96 a motion had been filed on behalf of the two petitioners to have the warrant issued on them recalled and the said application had been refused. Thereafter on 5.12.96 a motion had been filed on behalf of the sureties and the warrant that was re-issued had been re-called and the sureties had been warned that the case would be called on 16.12.96.

On 16.12.96 the two sureties had been released on bail in a sum of Rs. 25,000/- in cash with two sureties acceptable to court, as the sureties who were produced on behalf of the petitioners were not acceptable on 23.11.96 the Court had accepted the four sureties named in the proceedings on that date as sureties for the petitioners. On 10.01.97 the case had been called and the sureties had been present. The sureties had moved for a month's time to produce the accused. Learned State Counsel had submitted that the sureties had been released on bail inadvertently since the sureties had moved for time to produce the accused. The case was directed to be called on 10.02.97. The proceedings on 10.02.97 reveals that an open warrant had again been issued on the accused as he was absent. The two petitioners who stood as sureties for the accused had been present and represented. The Court had directed that the sureties be released on bail in a sum of Rs. 50,000/- each in cash with two sureties acceptable to the Learned High Court and in default of the deposit of the security that the sureties be remanded. In consequence of this order it is submitted that the petitioners were remanded.

We have considered the proceedings held before the Learned High Court Judge and as conceded by the Learned State Counsel that there is no provision for the learned High Court Judge to have made the orders dated 10.02.97 and 16.12.96. In the circumstances we set aside the orders dated 16.12.96 and 10.02.97.

It is to be noted the provisions with regard to failure of the sureties to fulfil their obligations have been set out in section 422 of the Code of Criminal Procedure Act, No. 15 of 1979. When the original order for bail for the accused in a sum of Rs. 150,000/- in cash with two sureties was made by the Learned High Court Judge on 20.07.96, the two petitioners had stood as surety for the accused in a sum of Rs. 150,000/- each upon the failure of the two sureties to produce the accused in Court the learned Trial Judge should have, in our view, notified the sureties to show cause as to why the bond in a sum of Rs. 150,000/- should not be cancelled. This the learned High Court Judge has failed to do. Instead of that he had made several orders which are sought to be impugned which were unwarranted. Since bail in a sum of Rs. 50,000/- has already been deposited on behalf of the two sureties we direct the two sureties Rajapakse Pathiranage Don Rupasena and Sudath Senaka Hettiyakanda to deposit a sum of Rs. 125,000/- each in satisfaction of the bond that they had entered into on 04.07.96. Upon compliance with this order for deposit of a sum of Rs. 125,000/- each that the petitioners be released from custody.

The Registrar is to forward copies of this order to the learned High Court Judge. A copy may be issued to counsel for the petitioner on payment of usual charges.

The original record in this Case No. 4107/97-HCBA and the Receipt Book containing duplicates 931101-931202 are returned to the Registrar of the High Court.

J. A. N. DE SILVA, J. – I agree.

Application allowed.