

**EDIRIWEERA
VS
THE ATTORNEY GENERAL**

COURT OF APPEAL
BALAPATABENDI, J.
WIJERATNE, J. AND
DE ABREW, J.
C.A(PHC)25/2005
H.C. COLOMBO NO.955/2002
JYLY 13 AND 20TH, 2002

Penal Code, sections 32, and 380 - Robbery -Convicted - Bail pending appeal referred by High Court - Criminal Procedure Code, section 404-Bail Act, No. 30 of 1997-Jurisdiction of the Court of Appeal to grant bail- Exceptional circumstances? - Could the order of the High Court be revised?

The accused -appellant - petitioner was convicted of the offence of robbery of gold and sentenced to a term of 10 years R. I. and a fine. The application for bail made to the High Court was refused. The accused appellant thereafter moved the Court Appeal for bail. The exceptional circumstances urged were (a) that the petitioner is suffering from a rare blood condition where he must be treated in a hospital where such facilities are available. (2) disruption of his studies (3) that appeal would take time.

HELD

BALAPATABENDI, J. WIJEYARATNE, J. AND ABREW, J.

(1) It is a settled principle that the release of a person on bail pending appeal to the Court of Appeal will only be granted in exceptional circumstances.

Per Abrew, J.

"If the High Court Judge's order is correct, that there are no exceptional circumstances the order cannot be revised. Revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice."

Balapatabendi, J. and Wijeyaratne, J.

- (i) It is to be noted that the respondent has not denied the fact that the accused appellant needs specialised treatment as stated in the Medical Certificate and such treatment could not be given by the Prisons Authorities in the Prisons Hospital or in a hospital.
- (ii) In the Court of Appeal it will take at least more than one year for this appeal to be taken up - so that the final determination of the appeal may take many years and it could be considered as a long delay to determine the appeal.
- (iii) Important points of law namely - common intention and *actus reus* not been applied in evaluating the evidence by the High Court, the position taken up in the judgment that the 2nd accused appellant was caught red handed is questionable.
- (V) The father of the accused appellant had been a cancer patient when this application was filed and had been recommended by Professor Silva, to allow the accused appellant to see his father on humanitarian grounds.

The matters above could be considered as exceptional circumstances.

Abrew, J dissenting :

- (i) "There is no evidence before Court that the petitioner's health condition cannot be treated either at the prison hospital or at any hospital in Sri Lanka.
- (ii) Delay in preparation of the appeal brief and the delay in taking up the argument - considering the facts of this case-do not come under the category of exceptional circumstances.

APPLICATION for bail pending appeal.**Cases referred to :**

1. *Q vs Rupasinghe Perera* - 62 N LR 238
2. *K vs Keerala* - 48NLR 202
3. *Q vs Cornelis Silva* - 74NLR 113
4. *Salahudeen vs Attorney General* - 77NLR 262.

5. *Jayantha Silva vs Attorney General - (1997) 3 Sri LR 117*
6. *Ramuthamotheram Pillai vs Attorney General - SC 141/75*
7. *Vanik Incorporation LTd. vs Jayasekera - (1997) 2 Sri LR 365*
8. *Q vs Liyanage - 65 NLR 289 at 291*
9. *King vs Mathuratta - 54 NLR 493*
10. *Kamal Addaraarachchi vs Attorney General (2000)3 Sri LR 393*
11. *R vs Cooray - 51 NLR362*
12. *Harbajan Singh vs State of Punjab - (1977) Cr LR 1424*

Dr. Ranjith Fernando for accused appellant petitioner.
Yasantha Kodagoda, Senior State Counsel for Attorney General.

Cur.adv.vult.

August 2, 2005

SISIRA DE ABREW, J. – (Dissenting)

The accused appellant - petitioner (petitioner) was convicted of the offense of robbery of gold valued at Rs. 2,928,720. and sentenced to a term of 10 years rigorous imprisonment on 30.03.2004 by the learned High Court of Colombo. In addition to the above sentence a fine of Rs.5000 was also imposed in default of which a term of 2 years imprisonment was imposed. Being aggrieved by the said conviction and sentence the petitioner preferred an appeal to this court. After the conviction the petitioner made an application for bail pending appeal, which application was refused by the learned High Court Judge on 31.01.2005. Being aggrieved by the said order the petitioner preferred the present application for bail to this court.

The learned High Court Judge refused the application for bail on the ground that the petitioner had not established exceptional circumstances. It is necessary to consider whether the refusal of the application for bail by the learned High Court Judge on the said basis was correct or not. In deciding this question it is pertinent to consider whether the Bail Act, No. 30 of 1997 (the Bail Act) had taken away the requirement to establish exceptional circumstances in grating bail pending appeal. In *Queen VS Rupasinghe Perera*⁽¹⁾ Basnayake CJ with Sansoni J and Sinnathamby J agreeing remarked as follows "Bail is not granted by the Court of Criminal Appeal unless there are exceptional circumstances". Same view was expressed in *King Vs Keerala*⁽²⁾ *Queen Vs Cornelis Silva*⁽³⁾ *Salahudeen Vs Attorney General*⁽⁴⁾ *Jayantha Silva Vs the Attorney General Ramu Thamotheram Pillai Vs Attorney General*⁽⁴⁾ (Considered by Gunasekara J in Jayanthi Silva's case.)

Thus it is seen from the above judicial decisions, to release a convicted prisoner on bail there must be exceptional circumstances. Since the above cases are decided prior to the enactment of the Bail Act, it is safe to conclude that the requirement to establish exceptional circumstances in an application for bail pending appeal existed even prior to the enactment of the Bail Act.

Since I am dealing with the legality of the order of the learned High Court Judge it is necessary to consider the relevant provisions which vested power with the High Court. The relevant provision is section 333(3) of the Criminal Procedure Code which reads as follows. "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 the appeal be treated in such manner as may be prescribed by rules made under the Prisons Ordinance." So when Court granted bail pending appeal under section 333(3) of the Criminal Procedure Code, convicted prisoners were released on bail only in exceptional circumstances. It is now necessary to consider whether the statutory provisions relating to granting of bail have undergone any changes after the enactment of the Bail Act. The relevant provision of the Bail Act is section 20(2) which reads as follows.

"When an appeal against a conviction by a High Court is preferred, the High Court may subject to subsection (3) release the appellant on bail pending the determination of his appeal. An appellant who is not released on bail shall, pending the determination of the appeal be treated in such manner as may be prescribed by rules made under the Prisons Ordinance." It is therefore seen that section 333(3) of the Criminal Procedure Code was in terms identical with section 20(2) of the Bail Act. Thus, statutory provisions relating to granting of bail prior to and after the enactment of the Bail Act remain unchanged. Therefore requirement to establish exceptional circumstances to grant bail pending appeal should exist even after the enactment of the Bail Act. I therefore hold that the learned High Court Judge was correct when he concluded that there must be exceptional circumstances to release a convicted prisoner on bail.

If the learned High Court Judge's order on this point is correct, should it be revised? Revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice. *Vide Vanik Incorporation Ltd⁽⁷⁾ Vs Jayasekara.*

Applying the principle laid down in the above case to the issue in question, I hold that the question of revision of the said order of the learned High Court Judge does not arise for consideration. On this ground alone petition of the petitioner should be dismissed.

In the case of *King Vs Keerala* (Supra) Wijewardena J held that “this Court (the Court of Criminal Appeal) does not grant bail in the absence of exceptional circumstances” In *Queen Vs Rupasinghe Perera* (Supra) Basnayake CJ with Sansoni J and Sinnathamby J agreeing remarked as follows “Bail is not granted by the *Court of Criminal Appeal unless there are exceptional circumstances*”. In *Queen Vs Cornelis Silva* (Supra) 113 the accused had been convicted of the offence of attempted murder and sentenced to terms of four years rigorous imprisonment. The appellant’s application for bail pending appeal was refused on the ground that no exceptional circumstances had been established. In *Salahudeen Vs Attorney General* (Supra) the accused had been sentenced to a term of three years rigorous imprisonment on a conviction for attempted culpable homicide. Samarawickrama J refusing the appellant’s application for bail observed as follows. “It is a settled principle that the release of a prisoner on bail pending an appeal to the Court of Criminal Appeal will only be granted in exceptional circumstances”. In *Ramu Thamootheram Pillai Vs Attorney General* (Supra) (Considered by Gunasekara J in *Jayanthi Silva’s* case) the application for bail made on behalf of the appellant who was sentenced to a term of 7 years rigorous imprisonment was refused on the ground that no exceptional circumstances had been established. In *Jayanthi Silva Vs the Attorney General* (Supra) Gunasekara J held as follows. “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”. On a consideration of the above judicial decisions, it seems to me that the release of a prisoner on bail pending an appeal to the Court of Appeal will only be granted in exceptional circumstances. This position remains unchanged even if the application is made under Section 404 of the Criminal Procedure Code. I have earlier pointed out that the requirement to establish exceptional circumstances to grant bail pending appeal exists even after the enactment of the Bail Act, No.30 of 1997. For the above reasons, I hold that an application for bail pending appeal will be allowed only in exceptional circumstances. It now remains for me to consider whether the petitioner has established exceptional circumstances. The petitioner has submitted following grounds

as exceptional circumstances. (a) The petitioner is suffering from a rare blood condition requiring regular and frequent medical treatment and he must be treated in a hospital where such facilities are available. (b) Disruption of his studies; (c) Preparation of appeal brief would take time; and (d) The delay in taking up the appeal for argument.

Learned counsel for the petitioner produced medical certificate P6 in support of ground (a) above. But P6 does not state that the petitioner's health condition cannot be treated in a hospital in Sri Lanka. There is no evidence before this court that the petitioner's health condition cannot be treated either at the prison hospital or at any hospital in Sri Lanka. Therefore ground (a) above does not come under exceptional circumstances. With regard to ground (b) above, learned counsel for the petitioner has submitted a diploma certificate marked P7. The petitioner completed his diploma in May 2000. The petitioner was convicted on 30.03.2004. There is no evidence to suggest that the petitioner has engaged in any studies after his diploma in May 2000. Therefore ground (b) above does not fall within the category of exceptional circumstances.

Ground nos (c) and (d) above are the delay in preparation of the appeal brief and the delay in taking up the appeal for argument.

In *Queen Vs Rupasinghe Perera* (supra) the main ground urged in support of the application (bail pending appeal) was that the hearing of the appellant's appeal was likely to be delayed as the preparation of the transcript of short hand notes of the proceedings was likely to take more than usual time owing to the length of the trial in the course of which over 100 witnesses were examined and more than 400 exhibits were produced. Basnayake CJ remarked as follows "The applicant has not satisfied court that this is a case in which we should take the exceptional and unusual course of granting bail". The application for bail in that case was refused.

When the principles laid down in the above case are applied to the facts of this case ground nos (c) and (d) do not come under category of exceptional circumstances.

The other ground urged by the counsel for the petitioner may be set out as follows. (a) The subject matter of the robbery was fully recovered ; (b) There is no claimant for the subject matter of the charge (items of gold);

(d) The petitioner was convicted on the basis of common intention ; The petitioner is prepared to furnish two sureties of very high professional standing.

These grounds, in my view, are not exceptional grounds to release the prisoner on bail.

For the above reasons, I hold that the petitioner has not adduced exceptional circumstances to grant bail. I therefore refuse the application for bail and dismiss the petition of the petitioner.

Application dismissed

JAGATH BALAPATABENDI, J.

The 1st accused and the 2nd accused - appellant had been found guilty for a charge of robbery under section 380 of the Penal Code read with section 32, and they were sentenced to 10 years R, I in addition to a fine of Rs.5000.

The application made by the 2nd accused - appellant for bail pending the appeal, had been refused by the learned High Court Judge on 13.01.2005.

This application was made by the 2nd accused - appellant on the 26.01.2005 under section 404 of the Criminal Procedure Act, against the order of the learned High Court Judge, praying that the accused - appellant be enlarged on bail pending the appeal, on the grounds averred in the petition. The grounds averred as exceptional circumstances before the learned High Court Judge were refused on the following reasons :-

(1) No documents were tendered in support of :

- (a) the accused -appellant pursuing his studies,
- (b) the incarceration of the accused - appellant would disrupt his education
- (c) the ill - health of the accused - appellant.

(2) No material placed to satisfy Court that there would be long delay for the appeal to be heard.

(3) The chances of succeeding in the appeal would be very remote as the accused appellants were caught 'red - handed'.

Section 2 of the Bail Act No. 30 of 1997 states as follows :-

"Subject to the exception as hereinafter provided for in this Act, the guiding principle in the implementation of the provisions of this Act shall be, that the grant of bail shall be regarded as the rule and the refusal to grant bail as the exception."

In the case *Queen Vs. Liyanage*⁽⁸⁾ it was observed by Sansoni J. that "Even if our discretion to grant bail is unfettered it must still be judicially exercised". It proceeded to state further at page 293 as follows : "But it is not to be thought that the grant of bail should be the rule and refusal of bail should be the exception where serious non - bailable offences of this sort are concerned, bail is in such cases granted only in rare instances and for strong and special reasons, as for instance, where the prosecution case in prima- facie weak".

In the case of *Salahudeen vs. Attorney General*⁽⁴⁾ it was stated that "It is settled principle that the release of a prisoner on bail pending an appeal to the Court of Criminal Appeal will only be granted in exceptional circumstances."

In *Ramu Thamotherampillai vs. Attorney General*⁽⁶⁾ Vythelingam, J affirmed the principle that the Court would require the appellants to show the existence of exceptional circumstances to warrant the grant of bail pending appeal".

As aforesaid the Sri Lanka Courts have consistently held that bail pending appeal would not be granted unless there were 'exceptional circumstances' shown to exist :-

Eg. King Vs Mathuratta⁽⁹⁾ *King Vs Keerala*⁽²⁾ *Queen Vs Coranelis Silva*⁽⁷⁾
In the case of *Kamal Addarachchi Vs Attorney General*, the Court took into consideration that the preparation of the appeal briefs and hearing of the appeal would take a considerable period of time, and it was treated as an 'exceptional circumstance' to grant bail.

In *Rex Vs Cooray* bail was granted on the ground of ill-health, that the accused - appellants were not likely to abscond and the complexity of the

case. So that, it is clear the existence of exceptional circumstances would depend on the facts and circumstances of each case.

In the case of *Harbhagan Singh Vs. State of Punjab*⁽¹²⁾ it was held that the factors which the Appellate Court is to consider in an application for bail pending appeal were :- (a) whether a prima facie ground exists for substantial grounds for believing that the convicts committed the offences in question, or (c) whether the circumstances are such as likely to delay the decision of the appeal for an unreasonable time. It would afford scant satisfaction to the accused if after serving their full or substantial portion of their jail sentence their appeal succeeds and they are merely acquitted of the charge. This factor cannot be ignored and should be one of the considerations for granting bail.

Now I would like to deal with the grounds averred by the accused - appellant, in his application for bail pending appeal.

(a) The accused - appellant had alleged that he is suffering from a rare-blood condition and getting treatment for 'vasculities and atopy' from Dr. Chandima de Mel, a Consultant Physician, and he needs to be followed up at a specialized medical facility. (Vide the medical certificate dated 04.09.2004)

It is to be noted upto date the respondent has not denied the fact that the accused-appellant needs specialized treatment as stated in the medical certificate, and such treatment could not be given by the Prison authorities in the Prison Hospital or in a hospital.

The other point to be noted is from our experience in the Court of Appeal we note that it will at least take more than one year for this appeal to be taken - up, and at present we hear the appeals lodged in 2001, 2002 and 2003; further at present we have fixed appeals up to March, 2006.

So that, the final determination of this appeal may take many years, and it could be considered as a "long delay" to determine this appeal.

The learned High Court Judge had mentioned in his order the fact that the chances of succeeding the appeal were remote as the accused-appellant had been caught 'red-handed'

On the point, I would like to refer to the page 33 of the judgment, which contains as follows:-

ලීනස් ද මෙල්ගේ සාක්ෂිය අනුව ඉතා සන්සුන් වාතාවරණයක් මේ අවස්ථාවේදී තිබී තිබුණි. ලීනස් ගේ අතේ තිබුණු පාර්සලය පොලිස් නිලධාරියෙකු බවට හඳුනාගැනීමට පෙත්වූ අයකු විසින් ලබාගෙන පොලිසියට යා කියලා බලහත්කාරයෙන් ජීප් රථයට දාගෙන ඇත. මෙසේ පැමිණි පොලිස් නිලධාරියා කවුදැයි පැමිණිල්ලක් ප්‍රශ්න කර නොතිබුණ අතර විත්තියෙන් ද ඒ සම්බන්ධයෙන් ප්‍රශ්නයක් අසා නොතිබිණ. කෙසේ වෙතත් ලීනස් ද මෙල්ගේ පාර්සලය ගත්තේ 1 වන වුදිත බවට අනෙක් සාක්ෂිකරුවන් මගින් සහ 1 සහ 2 වුදිතයන්ගේ ප්‍රකාශ වලින් ද දක්නට ඇත.

The above paragraph reveals, the 1st accused took the parcel of gold from the witness Lenus de Mel which fact the 1st accused as well as the 2nd accused - appellant had admitted.

Did the 2nd accused-appellant share the common intention of the act done by the 1st accused under Section 32 as charged ? And whether there had been only a *actus-reus* of the 1st accused without the *mens-rea*. These important points of law had not been applied on evaluation of the evidence by the learned High Court Judge. The position taken up in the judgment that the 2nd accused - appellant was caught red-handed is questionable.

Further, I would like to advert our minds to the fact that the accused - appellant was only 21 years of age when the offence was committed with the principal offender the 1st accused. The father of the accused - appellant had been a cancer patient when this application was filed. *Vide* the letter by the Prof. H. J. De Silva, dated 22.03.2005 where he had recommended to allow the accused-appellant to visit his father a cancer patient on humanitarian grounds.

Thus, the reasons mentioned above could be considered as 'exceptional circumstances' to release the accused-appellant on bail pending the appeal.

The accused-appellant is released on bail in a sum of Rs. 75,000 in cash with two sureties namely - Professor S. B. Hettiarachchi and Ediriweera Weerawardena, In addition, I direct the mother of the accused-appellant namely Induruwage Dona Chandarani Jayanthi

Gunatillake Ediriweera to stand as a surety, on a surety bond in a sum of Rs.100,000. Also the accused-appellant is directed to report to the O. I. C. of Panadura Police last Saturday of every month, till the appeal is determined.

WIJEYARATNE, J. - I agree

Application allowed ;

Bail granted by majority decision.

Application allowed
