

ATTORNEY-GENERAL  
V.  
MOHAMED IQBAL ISMAIL AND TWO OTHERS

COURT OF APPEAL

P.R.P. PERERA, J.

W.N.D. PERERA, J. and A. de Z. GUNAWARDANA, J.

C.A. APPLN NO. 213/88

H.C. COLOMBO 2785/2786 AND 2787.

M.C. COLOMBO 79610.

JULY 26, 27, 1988.

*Criminal Procedure — Bail — Jurisdiction of High Court — S. 115 (3) of the Code of Criminal Procedure Act (esp. 2nd proviso)*

Has the High Court jurisdiction to enlarge an accused under S. 115 (3) of the Code of Criminal Procedure Act after he is committed to stand his trial in the High Court in terms of S. 154 of the Code ?

**Held**

S. 115 (2) empowers a Magistrate before whom a suspect is forwarded under S. 115 if he is satisfied that it is expedient to detain the suspect in custody pending further investigation, after recording his reasons, to order the detention of the suspect for a total period of 15 days and no more and, at the end of the said period may, subject to S. 115 (3) either discharge the suspect or require him to execute a bond to appear if and when so required.

2. (a) Section 115 (3) imposes a limitation on the power vested in the Magistrate by S. 115 (2) to release on bail or otherwise any person who has surrendered himself to Court or has been arrested in connection with an offence punishable under ss. 114, 191 or 296 of the Penal Code.
- (b) The first proviso to S. 115 (3) empowers a Magistrate to release such person on bail if proceedings are not instituted against him in a Magistrate's Court or High Court before the expiration of a period of three months from the date he surrendered to Court or was arrested unless the High Court on application made by the Attorney-General directs otherwise.
- (c) Where proceedings have been instituted against an accused within the three months period and he has been committed to stand his trial in the High Court in terms of S. 154 of the Code, S. 115 (3) does not apply, but a Magistrate can release him on bail with the sanction of the Attorney-General under S. 403 (3). The High Court has no such jurisdiction. The High Court becomes vested with jurisdiction only upon the indictment being presented.

**Cases referred to :—**

1. *Attorney-General v. Punchi Banda* — [1986] 1 Sri L.R. 40.

**APPLICATION** for Revision (by the Attorney-General) of the order of the High Court.

*Upawansa Yapa*, Deputy Solicitor-General for the Attorney-General, *Dr. Colvin R. de Silva* with *M.D.K. Kulatunga*, *Leon Seneviratne* and *Miss Chamantha Weerakoon* for Respondents.

*Cur. adv. vult.*

October 31, 1988

**P.R.P. PERERA, J.**

This is an application for revision by the Attorney General of an order made by the High Court of Colombo, dated 9.3.88, enlarging on bail the accused respondents above named.

The facts material to this application are as follows : Proceedings were instituted in the Magistrate's Court, Colombo, under the provisions of Section 136 of the Code of Criminal Procedure Act on a complaint filed by the Police alleging that the respondents committed the following offences :

- (a) Conspiracy to commit the murder of W.D. Amarapala, — an offence punishable under Section 296 read with Sections 113 (B), and 102 of the Penal Code, and
- (b) Committed the murder of Amarapala — an offence punishable under Section 296 of the Penal Code.

At the conclusion of the non-summary inquiry, the learned Magistrate, committed the accused to stand their trial in the High Court on the charges set out above, and remanded the accused respondents in terms of Section 159 of the said Act, on 8th December '87.

The respondents above named then filed three separate applications for bail in the High Court of Colombo, bearing Nos. 2785, 2786 and 2787 praying that they be released on bail. At the inquiry held into these applications by the High Court Judge

the Attorney General objected to these respondents being released on bail on the ground that the High Court had no jurisdiction to grant bail to the respondents at that stage as the Attorney-General had not filed indictments against the respondents in the High Court.

The learned High Court Judge, after inquiry, made order on 9.3.88, enlarging the accused respondents on bail holding that the High Court had jurisdiction to do so under the proviso to Section 115 (3), of the Code of Criminal Procedure Act. It is this order that the Attorney General has sought to challenge by way of revision in the present proceedings.

Mr. Upawansa Yapa, Deputy Solicitor General, who appeared in support of this application contended that this order of the learned High Court Judge was manifestly illegal, and was made without jurisdiction and hence, should not be permitted to stand. Learned Deputy Solicitor General, submitted that the High Court had no jurisdiction whatsoever, to make this order under the provisions of the Code of Criminal Procedure Act, and in particular, Counsel urged that the learned High Court Judge, was in error and has seriously misdirected himself when he held that the High Court had jurisdiction to enlarge the respondents on bail in terms of the provisions of Section 115 (3) of the said Act, and more specifically, the second proviso to this subsection.

The question that arises for determination in the instant case therefore is whether the High Court has jurisdiction to enlarge an accused on bail under the provisions of Section 115 (3) of the Code after he is committed to stand his trial in the High Court in terms of Section 154 of the Code of Criminal Procedure act.

It would therefore be necessary at the outset to examine the provisions of Section 115 (3), for the purpose of deciding the question whether this particular provision vests in the High Court jurisdiction to make the order, the learned High Court Judge, purported to make in this case.

Section 115 (3) of the said Act, specifically provides that a Magistrate shall not release on bail or otherwise, any person who has —

- (a) surrendered to Court, or
- (b) been arrested, consequent on an allegation that he has committed or has been concerned in, or is suspected to have committed, or to have been concerned in committing an offence punishable under Sections 114, 191 or 296 of the Penal Code.

Section 115 (2) however empowers a Magistrate before whom a suspect is forwarded under Section 115, if he is satisfied that it is expedient to detain the suspect in custody pending further investigation, after recording his reasons, to authorise the detention of such suspect for a total period of fifteen days and no more and at the end of the said period may, subject to section 115 (3) either discharge the suspect or require him to execute a bond to appear if and when so required. Thus, section 115 (3) imposes a limitation on the power vested in the Magistrate by Section 115 (2) to release on bail or otherwise any person who has surrendered himself to Court or been arrested in connection with an offence punishable under sections 114, 191 and 296 of the Penal Code.

The first proviso to this subsection empowers a Magistrate, to release such person on bail if proceedings are not instituted against him in a Magistrate's Court, or High Court, before the expiration of a period of three months from the date he surrendered to Court, or was arrested, unless the High Court on application made by the Attorney General directs otherwise. This proviso therefore has in my view no application to the present case as proceedings against the respondents have been instituted in this case within the three month period stipulated in this proviso.

It is indeed the second proviso to section 115 (3) which needs careful scrutiny in the instant case. This proviso empowers a High Court to release such person (i.e. a person referred to in the first proviso) on bail before or after the expiration of the period of three months referred to in the preceding provisions of this subsection.

The question which arises for determination in the present case, therefore, is whether the second proviso to section 115 (3) vests the High Court with Jurisdiction to enlarge an accused on bail after he is committed to stand his trial in the High Court by the Magistrate in terms of Section 154 of the Code of Criminal Procedure act.

On an examination of the scheme of the Code of Criminal Procedure, it appears that Section 115 is meant to deal with a situation when an investigation into an offence cannot be completed within a period of twenty four hours fixed by section 37, and this section forms part of Chapter XI of the Code which deals with the investigation of offences. In this context it was rightly contended on behalf of the Attorney General, that this section permits the detention of a suspect "pending investigation" to enable the investigators to discover evidence sufficient to make a definite allegation against the suspect. Section 120 (1) and (2) also lend support to this view. As has been pointed out in *Attorney General v. Punchi Banda* (1) that "These sections enable judicial scrutiny and control over the Police Investigations. This is a power given to the judiciary to supervise the progress of the Police investigation with a view to ensuring that once a suspect is remanded, the suspect would not continue to remain in custody in the absence of sufficient evidence". Further, section 115 (3), empowers a Magistrate to release a suspect on bail, where such suspect is held in custody in connection with offences under section 296, 191 or 114 of the Penal Code, if the investigators fail to find evidence sufficient to make a definite allegation during the stipulated period of three months.

The second proviso is clearly applicable to a suspect referred to in the first proviso, and empowers a High Court in special circumstances to release "such person" on bail before or after the expiration of the period of three months referred to "in the preceding provisions of this subsection". Therefore the said second proviso has no application to the present case where the accused have been committed in terms of Section 154 of the Code to stand their trial.

The next stage of the investigation is dealt with under section 116 of this Act. This section enacts that if upon an investigation it appears to the Police that, " the information is well founded " he shall forward the suspect to a Magistrate, or take security for his appearance before such Magistrate. Once a suspect is taken before a Magistrate by the Police, on the basis that " the information is well founded, then by virtue of section 136 (1) (d), proceedings are instituted, and the Magistrate is directed to commence a preliminary inquiry under the provisions of section 145 of the Code. Therefore a suspect in respect of whom proceedings have been thus instituted would not be entitled to be enlarged on bail under section 115 of the Code of Criminal Procedure act.

In the present case, the applications for bail, on behalf of the respondents have been made to the High Court, after the learned Magistrate concluded the preliminary inquiry provided for in section 145 of the Code, and had committed the respondents to stand their trial in the High Court in terms of section 154 of the Code of Criminal Procedure Act. In such a case, a Magistrate, acting under the provisions of section 403 (3) can release an accused person on bail, only with the sanction of the Attorney General. It is pertinent to note, here that the High Court is not vested with any power to enlarge an accused on bail at the aforesaid stage. Learned Deputy Solicitor General submitted that the High Court will be vested with jurisdiction only upon presentation of an indictment to the High Court. We are of the view that, that is the correct position in law.

We hold therefore that the learned High Court Judge, had no jurisdiction to enlarge the respondent on bail in the instant case under the provisions of section 115 (3) of the Code of Criminal Procedure Act at this stage. We accordingly quash the order of the learned High Court Judge, dated 9.3.88, enlarging the respondents on bail, but in view of the special circumstances of this case, and the fact that the learned Deputy Solicitor General has informed this Court that the Attorney General has no objection to the release of these respondents on bail at this stage, we make order enlarging each of the suspects on bail in a sum of Rs. 10,000 cash, with two sureties acceptable to the Magistrate's Court and a personal bond of Rs. 15,000/-.

Before concluding this judgment we must observe that the learned High Court Judge has failed to follow the specific finding in the judgment of the Court of Appeal, in *Attorney General v. Punchi Banda* (1) which clearly stated that the High Court is empowered to enlarge an accused on bail in the offences referred to in section 403 (1) only with the sanction of the *Attorney General*.

**W.N.D. Perera, J.** — I agree.

**A. de Z. Gunawardana, J.** — I agree.

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