THE ATTORNEY-GENERAL
V
CHANDRASENA

COURT OF APPEAL
A. DE Z. GUNAWARDENA,J AND
ISMAIL,J
C. A. APPLN NO. 589/90
H. C. BADULLA CASE NO 27/89
M. C. MONERAGALA CASE NO. 16083
NOVEMBER 22, 1990 AND JANUARY 10, 1991.

Criminal Law - Accused sentenced to death, enlarged on bail by High Court, pending appeal - Section 333(4) of the Code of Criminal Procedure Act as amended by Act No. 13 of 1988 - Rule 46 and 49 of the Supreme Court Rules - Should Attorney-General file an affidavit in a revision application.

The accused who was convicted of murder and sentenced to death made an application for bail to the High Court of Badulla, pending his appeal. After inquiry, the High Court by its Order dated June 21, 1990 enlarged the accused on bail pending the appeal. The Attorney-General moved in Revision to set aside the said Order of the High Court.

Held:

(1) that the said amending legislation is expressive enough of the objective of the Legislature, and permits no discretion to the High Court to grant bail to an accused person sentenced to death, pending the determination of his appeal.

Per Gunawardana, J., "Upon a careful analysis of the new Section it appears that the operative words, as far as this case is concerned are, "he shall . . . be treated in such manner as may be prescribed by rules made under the Prisons Ordinance".

(2) that the absence of an affidavit by Attorney-General did not violate the provisions of Rule 46 of the Supreme Court Rules, as the Court was invited to decide only a question of law, and the relevant matters for that decision, have been admitted by the Accused-Respondent However, in a case where Attorney-General is inviting the Court to decide on a question of fact, he will be required to file affidavits through persons who have personal knowledge of the relevant facts.

(3) that there is no requirement under Rule 46, that the copy of the proceedings, required to be filed along with a Revision application, should be certified.

APPLICATION in revision of order of the High Court of Badulla.

C.R. de Silva Senior State Counsel for Attorney-General

Jayampathy Wickremaratne with *Gaston Jayakody* for Accused - Respondent

Cur. adv. vult.

February 27, 1991.

A. DE Z. GUNAWARDANA, J.

This is an application for Revision, filed by the Hon. Attorney-General seeking to set aside an Order made by the learned High Court Judge of Badulla on June 21, 1990. enlarging the Accused-Respondent on bail.

The Accused-Respondent was indicted in the High Court of Badulla for the murder of one Pahal Gedera Yasawathie, an offence punishable under section 296 of the Penal Code. After trial, the Accused-Respondent was convicted of the said charge, by an unanimous verdict of the Jury, and was sentenced to death on May 30, 1990. The Accused-Respondent has filed an appeal against the said conviction. An application for bail pending the said appeal was made to the High Court, Badulla, on June 5, 1990, and after inquiry, the said Order enlarging the Accused-Respondent on bail was made on June 21, 1990.

The learned Counsel for the Accused-Respondent raised several objections at the hearing of this application. Firstly, he submitted that Complainant-Petitioner has not filed an affidavit along with the petition

as required under Rule 46 of the Supreme Court Rules of 1978, and has thereby violated the mandatory provisions of the said Rule. He contended that there must be sworn testimony on facts for this Court to act on the petition and that is why a petition had to be supported by an affidavit. He said that Rule 46 does not exempt the Attorney-General. Further, he pointed out that his objection was not that there is no affidavit from the Attorney-General, but that there is no affidavit at all. In regard to the said objection the learned Senior State Counsel contended that this application has been made on a pure question of law viz, whether a High Court Judge has a discretion to allow bail in respect of an accused, against whom a sentence of death has been passed. What this Court is called upon to do is to interpret section 333(4) of the Code of Criminal Procedure Act, as amended by Act No. 13 of 1988. For this purpose the Court is not required to decide on any question of fact.

In our view the two matters relevant to the interpretation of the said section are:-

(a) Whether the Accused-Respondent has been sentenced to death, and

(b) Whether the Accused-Respondent has applied for bail, pending the determination of his appeal to this Court.

Both these matters are not disputed by the Accused-Respondent.

It was further submitted by the learned Senior State Counsel that it is a practice of the Court, which has now hardened into a rule that the Attorney-General does not file an affidavit, when he moves in Revision on a point of law, in respect of an Order, by any original Court. He however did not cite any authority to substantiate this contention.

In this context it is appropriate to note that an affidavit should be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to. The Attorney-General being a State Officer, acting in his official capacity, would generally be not able to testify to facts of a given case, of his own personal knowledge. Hence he would not be able to submit an affidavit relating to the facts through his own personal knowledge, although he is the Petitioner. However, in a case where he is inviting the Court to decide on questions of fact,

he will be required to file affidavits through persons who have personal knowledge of the relevant facts.

In the instant case, the Complainant-Petitioner has invited the Court to decide only a question of law, where the relevant matters have been admitted by the Accused-Respondent, as pointed out earlier. Therefore, we are of the view that in the circumstances of this case the absence of an affidavit has not violated the provisions of the said Rule 46.Secondly, the learned Counsel for the Accused-respondent submitted that it is a requirement under Rule 46, of the Supreme Court Rules that two sets of certified copies of the proceedings of the Court of First Instance should be filed along with an application for Revision. The learned Counsel pointed out that the Complainant-Petitioner has not complied with this requirement, but has only filed photo-copies of the proceedings. He added that observance of the provisions of the said Rule 46 is mandatory.

The learned Senior State Counsel referred to Rule 46 and pointed out that, what Rule 46 requires is that,

> ". . .Application by way of revision or restitutio in integrum under Article 138 of the Constitution shall be made **in like manner** (my emphasis) and be accompanied by two sets of copies of proceedings in the Court of First Instance, tribunal or other institution."

It is seen from the above quotation that, what Rule 46 requires is "two sets of copies of proceedings." It is significant to note that the said Rule does not state, two sets of **certified** (my emphasis) copies of proceedings.

However, the learned Counsel for the Accused-Respondent argued that the words "in like manner" occuring in the said Rule, implies that copies of the proceedings required to be filed along with a Revision application, should be certified. We are of the view that the words "in like manner" refer only to manner or form in which an application for Revision should be made viz. by way of petition and affidavit.

The learned Senior State Counsel further submitted that if the words "in like manner" included certified copies of the proceedings, then the words, "and be accompanied by two sets of proceedings in the Court of First Instance, tribunal or other institutions," which appear immediately fter the words, "made in like manner" would be redundant.

It is pertinent to note here that the first part of Rule 46 states that "Every application . . . shall be **by way of** (my emphasis) petition and affidavit . . ." The words "by way of petition and affidavit" sets out the manner in which the application should be made. Therefore the words "in like manner" which occur in the latter part of the said Rule in our view means, by way of petition and affidavit.

Therefore we are of the view that under Rule 46 there is no requirement that the copy of the proceedings, required to be filed along with a Revision application, should be certified.

In the course of the argument the learned Counsel for Accused-Respondent raised a third objection namely that the Complainant-Petitioner has failed to serve a copy of the impunged order and the proceedings on the Accused-Respondent, in terms of Rule 49 of the Supreme Court Rules. The learned Senior State Counsel submitted that, in fact, when this application was filed on 2nd July 1990, three copies of the petition and other proceedings were filed in this Court. We may also advert to the fact that in the docket and in the briefs of the Judges, that the petition to which the proceedings are attached, bears the 2nd July 1990, date stamp of this Court. In the circumstances we hold that there is substantial compliance with the requirement of Rule 49.

The learned Counsel for the Accused-Respondent finally submitted that the express requirement which was present in Section 333(4) of the Code of Criminal Procedure prior to the amending Act No. 13 of 1988, viz: that the accused shall be kept in custody, has been taken away by the said Amending Act. Hence, the said sections presently constituted does not expressly state that the detention of the accused is mandatory. Therefore, now there is a discretion vested in the High Court to grant bail in a suitable case. He also pointed out that there is provision already in the Prisons Ordinance, to segregate persons sentenced to death, from other prisoners in remand, if that be the objective of the said amendment. Hence, an amendment to achieve that objective is superflous. To support this contention he drew attention of this Court in particular to provisions of sections 50 and 51 of the Prisons Ordinance.

The learned Senior State Counsel submitted that in terms of section 333(4), as amended by Act No. 13 of 1988, it becomes mandatory upon the passing of the sentence of death to subject the accused person to the Prison rules, pending his appeal. A person could be subjected to

Prison rules, only if such person is in prison. He submitted that, therefore, upon passing of the sentence of death an accused person shall be kept in prison and hence would not be entitled to bail.

The learned Senior State Counsel further contended that, if the intention of the Legislature was to grant a discretion to the High Court regarding bail in respect of persons convicted of capital offences, then it could done so by deletion of the words, "subject to sub-section 4" in section 333(3) and the deletion of sub-section 4 in it's entirety. However, the Legislature had not done so. He added that, the fact that the Legislature proceeded to substitute a sub-section, in place of the original sub-section 4 of section 333, clearly indicates that it was not the intention of the Legislature to vest a discretion with the High Court regarding bail in respect of persons convicted of capital offences.

However, it must be pointed out that, if the said procedure was followed by the Legislature, the important provision in section 333 sub-section 4 that, "execution shall be stayed . . ., pending the determination of the appeal," would not be part of the law.

It would be appropriate to examine the original sub-section 4 of section 333 and the amended sub-section 4 of section 333 to ascertain whether the Legislature vested a discretion with the High Court in granting bail to a person sentenced to death, pending his appeal.

The original sub-section 4 of section 333 reads as follows:-

> "Where the accused is sentenced to death, execution shall be stayed and he shall be kept on remand in prison pending the determination of the appeal."

The substituted new section by the Amending Act No. 13 of 1988 states,

> "(4) Where the accused is sentenced to death, execution shall be stayed and he shall, pending the determination of the appeal, be treated in such manner as may be prescribed by rules made under the Prisons Ordinance."

The original section 333(4) stated that an accused person sentenced to death "shall be kept on remand in prison pending the determination of the appeal." These words clearly gives no discretion to the High Court to grant bail.

Upon a careful analysis of the new section it appears that the operative words, as far as this case is concerned are, "he shall . . . be treated in such manner as may be prescribed by rules made under the Prisons Ordinance." It is pertinent to note that the word used is "shall" and therefore admits no discretion. This would in effect mean that a person sentenced to death should be kept in prison pending the determination of his appeal, as he has to be subjected to Prison rules. Thus we are of the view that the said amending legislation is expressive enough of the objective of the Legislature, and permits no discretion to the High Court to grant bail to an accused person sentenced to death pending the determination of his appeal.

Accordingly, we allow this application and set aside the said order dated June 21, 1990 of the Learned High Court Judge of Badulla, granting bail to the Accused-Respondent pending his appeal.

We order that the execution of the Accused-Respondent be stayed and that he shall be kept in prison pending the determination of his appeal, and be treated in such manner as may be prescribed by rules made under the Prisons Ordinance.

ISMAIL, J - I agree.

Application allowed.