
**ATTORNEY - GENERAL AND OTHERS
VS
SUMATHIPALA**

SUPREME COURT.
BANDARANAYAKE, J.
WEERASURIYA, J.
UDALAGAMA, J.
DISSANAYAKE, J AND.
RAJA FERNANDO, J.
SC APPEAL 82/2004.
S.C. SPLA 190/2004.
CA (BA) 171/2004.

MC COLOMBO NO. 55 305/01.

13TH SEPTEMBER, 29TH SEPTEMBER, 27TH OCTOBER, 7TH-
DECEMBER AND 20TH DECEMBER 2005.

Bail- Code of Criminal Procedure Act, section 404 - Nature of power of Court of Appeal under section 404 of the Code - Whether it is an appellate and revisionary or original power - Whether section 47(1) of the Immigrants and Emigrants Act prohibits the Court of Appeal granting bail to an accused charged under section 45 of the Immigrants and Emigrants Act - Court cannot grant bail on the ground that section 47(1) of the Immigrants and Emigrants Act contravenes the fundamental rights of the accused.

On 04.12.2003 the Criminal Investigation Department reported to the Magistrate's Court of Colombo that the respondent abetted one Dhammika Amarasinghe to use an irregular passport, an offence punishable under section 45 of the Immigrants and Emigrants Act, an offence which is not bailable. Amarasinghe was on remand in another case. The respondent who could not be found appeared before the Magistrate, on a Poya holiday and was ordered a conditional release, terminating proceedings against the respondent.

On 10.12.2003 the 4th respondent (OIC/CID) instituted proceedings against the respondent and Amarasinghe in the Chief Magistrate's Court for an offence under section 45 of the Immigrants and Emigrants Act.

Amarasinghe was murdered in the Magistrate's Court when he was produced in another case. The respondent appeared before the Magistrate and the Magistrate ordered his remand. No bail application was made or refused in respect of him under section 402 or 403 of the Code of Criminal Procedure Act.

However, on an application made to the Court of Appeal which was decided by a Divisional Bench of 3 judges the respondent was enlarged on bail. Sri Pavan, J. held that under section 404 of the Code, the power of the Court of

Appeal was appellate whilst Abeyratne, J. held separately that its power was original. Bail was granted in view of the fact that the prohibition against bail in section 47(1) of the Immigrants and Emigrants Act was too harsh and interfered with the fundamental rights of the respondent.

HELD:

1. The power of the Court of Appeal under section 404 of the Code is appellate or revisionary (and not original) and applied only to cases under sections 402 and 403 of the Code.
2. Section 471(1) of the Immigrants and Emigrants Act prohibited bail pending trial to a person charged with an offence under section 45 of that Act, and particularly in view of Article 80(3) of the Constitution, even the Supreme Court had no power to grant bail prohibited by the plain words of section 47(1) of the Immigrants and Emigrants Act. It is for the Parliament to amend the Law, if it is too harsh.

1. *Benwell v. The Attorney General* 1988 1 Sri LR 1
2. Rev. Singarayar Sri Kantha Law Reports II 154
3. *In Re Ganapathpillai* 1920 21 MR 481
4. *Flora v United States* 362 US 145
5. *Mannalige Gowda v Star of Mysore* PIR 1964 Mysore 84
6. *Benoy Krishna v State of West Bengal* IR 1966 Cal 429
7. *The King v Lokunona* 1908 11 NLR 120
8. *Kamusumay v Minister of Defence and External Affairs* 1961 63 NLR 214
9. *Kanapathy v Jayasinghe* 1964 GG NR 549
10. *Nithynandan and Others v Attorney General and Another* 1983 2 Sri LR 251
11. *Jyotiben Ramlal v State of Gujarat* 1996 1 Gu J. L. K. 395
12. *Aswini Kumar v Aravinda Bose* AIR 1952 SC 369
13. *Union of India Shriani Bai* AIR 1954 SC 596
14. *Kushi Ram v The State* 1954 AIR 779
15. *Babu Singh v State of Uttar Pradesh* AIR 1978 SC 527
16. *Magor and Mellons RDC v Newport Corporation* 1952 AC 189
17. *Government Agent, Superintendent of Police v Suddhana et al.* 1905, Tambiahs' Report 39.

APPEAL from the judgment of the Court of Appeal.

Yasantha Kodagoda, Deputy Solicitor General with Harshika de Silva, State Counsel for appellant.

D. S. Wijesinghe, PC with Navin Marapana and Kaushalya Molligoda for respondent.

29th March, 2006.

SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgments of the Court of Appeal dated 18.06.2004. By those judgments, the Court of Appeal enlarged the petitioner-respondent (hereinafter referred to as the respondent) on bail. The respondents-appellants (hereinafter referred to as the appellants) appealed therefrom primarily on the basis that there are serious errors of law in the judgments of the Court of Appeal, which have now given rise to far reaching implications in the administration of criminal justice. Learned Deputy Solicitor General submitted that the appellants do not want a reversal of the *status quo* in relation to the respondent and the respondent who was enlarged on bail could remain so, as there are no violations of the conditions of bail, whatever be the outcome of this appeal. In view of this submission, learned President's Counsel for the respondent submitted that he had no objection to leave being granted on questions of law raised by the appellants. Accordingly special leave to appeal was granted on 11 questions based on the judgment of Sripavan, J. with whom the President of the Court of Appeal Somawansa, J. agreed (hereinafter referred to as the judgment of Sripavan, J.) and on 7 questions based on the judgment of Abeyratne, J. in which Abeyratne, J. had agreed with the decision of Sripavan, J., but gave separate reasons (hereinafter referred to as the judgment of Abeyratne, J.)

At the hearing, both learned Counsel agreed that although there are eighteen questions on which special leave to appeal was granted, the issues that have arisen for determination by this Court would be as follows :

- (a) whether section 404 of the Code of Criminal Procedure Act, vests only appellate and revisionary jurisdiction in the Court of Appeal or whether the Court of Appeal is also vested with original jurisdiction ?;
- (b) Whether section 47(1) of the Immigrants and Emigrants Act serves as a prohibition on the Court of Appeal to consider granting bail to a person accused of an offence under Section 45 of the Immigrants and Emigrants Act ?;

(c) the applicability of section 3(1) of the Bail Act.

Learned President's Counsel for the respondent, however submitted that neither the appellants nor the respondent had raised the question on the applicability of section 3(1) of the Bail Act before the Divisional Bench of the Court of Appeal and therefore although the appellants had made submissions briefly on the subject, the respondent would not deal with the aspect of the applicability of section 3(1) of the Bail Act.

Considering this submission of the learned President's Counsel for the respondent, it was agreed upon at the hearing that the law relating to section 3(1) of the Bail Act would be considered in detail in S. C. (Appeal) No. 28/2005, which case was heard by the same Bench and will not be considered in this appeal.

The facts of this appeal, as submitted by the learned Deputy Solicitor General for the appellants, *albeit* brief, are as follows :

Pursuant to criminal investigations conducted by the Criminal Investigation Department (hereinafter referred to as the CID) on 04.12.2003, criminal proceedings were initiated against the respondent and another, in the Magistrate's Court of Colombo. These proceedings were initiated following the filing of a Report under the Code of Criminal Procedure Act, No. 15 of 1979 (hereinafter referred to as the Code of Criminal Procedure Act), wherein it was alleged that the respondent had abetted one Dammika Amarasinghe to use an irregular passport issued under the name of Buddhika Priyashantha Godage. At that time, whilst the respondent was not under arrest by the police, the said Dammika Amarasinghe was in remand custody consequent to a remand order made in another case.

According to the appellants, since 04.12.2003, officers of the CID unsuccessfully attempted to arrest the respondent for having committed the aforementioned offence. However, it had not been possible to arrest him as he was not found in any of the locations where it was reasonable to assume that he would be found. However, as stated by the appellants, on 08.12.2003 (which was a public holiday, due to that day being the Poya Day), the respondent had surrendered to Magistrate A. S. Gamlath Arachchi, who was on roster duty to function as the Magistrate on behalf of all the other Magistrates of Hulftsdorp, Colombo. At the conclusion of

that day's proceedings, the said Magistrate made order of 'conditional release', thereby according to the appellants, terminating the proceeding against the respondent.

Thereafter on 10.12.2003, the 4th appellant instituted criminal proceedings against the respondent and Dammika Amarasinghe in the Chief Magistrate's Court, Colombo by filing a complaint under section 136(1)b of the Code of Criminal Procedure Act. Since the respondent and Dammika Amarasinghe became accused for having committed offences under section 45 of the Immigrants and Emigrants Act, the appellants moved the Magistrate's Court for the issue of a warrant of arrest of the respondent. The learned Magistrate made order refusing to issue a warrant of arrest, but issued summons on the respondent.

Consequent to the institution of criminal proceedings, the aforementioned Dammika Amarasinghe was murdered when he was arraigned in the Magistrate's Court regarding another case.

On 19.01.2004, the prosecution in case No. 55305/3/1 submitted to the learned Magistrate a charge sheet for consideration of Court and on that day the respondent, who had avoided appearing before the Magistrate's Court until then, appeared before the Magistrates and was placed in remand custody. On 30.01.2004, the appellants had moved to amend the charge framed against the respondent, which was allowed and the respondent had pleaded not guilty and he was charged for having committed an offence under section 45(1) (a) of the Immigrants and Emigrants Act, which is punishable in terms of section 45(2) of the said Immigrants and Emigrants Act.

According to the appellants, the trial against the respondent commenced in the Chief Magistrate's Court and was proceeding and no application was made seeking his enlargement on bail. Therefore the appellants contended that there does not exist an order by the learned Magistrate made upon a consideration of such application refusing to enlarge the petitioner on bail.

On 27.01.2004, the respondent filed an application in the Court of Appeal seeking an order from the Court of Appeal granting bail to the respondent (P5). On a consideration of circumstances pertaining to the hearing of this matter and of certain questions of fundamental importance arising for

determination in the case, the President of the Court of Appeal made order constituting a Divisional Bench (P9), which heard the respondent's application.

On 18.06.2004, the Court of Appeal made order enlarging the respondent on bail in a sum of Rs. 250,000 in cash with three sureties acceptable to the Magistrate, who should be government servants drawing a monthly salary not less than Rs. 20,000. The Court also ordered that the passport of the respondent be impounded and to be kept in the custody of the Registrar of the Court. The Court also directed that the respondent should report to the 3rd appellant, namely the Director of the Criminal Investigation Department, once a fortnight (P10).

Having set down the facts of this appeal, as set out by the appellants, let me now turn to consider the main question of law taken up at the hearing of this appeal.

At the commencement of the hearing, learned President's Counsel for the respondent took up a preliminary objection that the appellants had not tendered their written submissions in terms of the Supreme Court Rules of 1990. The appellants by way of a motion dated 18.03.2005, prior to the commencement of the hearing as well as at the stage of argument, explained the reasons for the delay in filing their written submissions. However, at the stage of hearing as well as in their written submissions filed subsequent to the conclusion of the hearing, learned President's Counsel for the respondent had submitted that having regard to the importance of the issue relating to the question of the nature of the jurisdiction of the Court of Appeal and also having regard to the conditional nature of the special leave to appeal granted to the State where the respondent to be on bail irrespective of the outcome of the appeal, the respondent does not wish to pursue the preliminary objection. Since the respondent is not pursuing the preliminary objection regarding the filing of the written submissions in terms of Supreme Court Rules, this Court will not go into the matter and would consider only the main appeal to which I would now turn to on the basis of the two questions referred to earlier.

- (A) Whether section 404 of the Code of Criminal Procedure Act, vests only appellate and revisionary jurisdiction in the Court of Appeal or whether the Court of Appeal is also vested with original jurisdiction ?**

Learned Deputy Solicitor General for the appellants strenuously contended that section 404 of the Code of Criminal Procedure Act, confers only an appellate/revisory jurisdiction in the Court of Appeal and the said jurisdiction is restricted to situations which fall under sections 402 and 403 of the Code of Criminal Procedure Act. The respondent on the other hand submitted that the position with regard to the afore-mentioned question is extremely clear and that section 404 of the Code of Criminal Procedure Act, confers original jurisdiction on the Court of Appeal to entertain applications for bail from any person in custody. The Court of Appeal in Sripavan, J., 's judgment referring to the decision in *Benwell v The Attorney General*⁽¹⁾ where it was stated that,

“the Court of Appeal is empowered in the exercise of its appellate jurisdiction to admit any person in custody to bail in the cases referred to in Sections 402 and 403,”

had considered the matter in question on the basis that the Magistrate had refused to grant bail to the appellant and therefore the existence of an order of an original Court was in force at the time the appellant made his application to the Court of Appeal to exercise its jurisdiction.

Abeyratne, J. on the other hand, in his judgment, after considering the decisions in *Rev. Singarayar*⁽²⁾ and in *re Ganapathipillai*⁽³⁾ has clearly stated that, the Court of Appeal has original jurisdiction.

Accordingly it is necessary to examine section 404 of the Code of Criminal Procedure Act. It is now well-settled law that the legislative history of a statute is the most fruitful source of instruction as to its proper interpretation (*Flora v United States*⁽⁴⁾ *Mannalige Gowda v State of Mysore*⁽⁵⁾ *Benoy Krishana v State of West Bengal*⁽⁶⁾. Discussing the importance in considering the legislative history of statute in interpretation, Bindra is of the view that (Interpretation of Statutes, 9th Edition, pg. 863)

“It is also well-settled that in interpreting an enactment, the Court should have regard not merely to the literal meaning of the words used, but also take into consideration the antecedent history of the legislation, the purpose and the mischief it seeks to suppress.”

Notwithstanding the aforementioned, Bindra had further stated (supra pg. 876) that,

“When the statute has undergone changes by way of amendments or otherwise, it is not only permissible, but of great assistance on the matter of interpretation to examine the legislative history of the provisions.”

Therefore as referred to by Maxwell (Interpretation of Statutes, 7th Edition, pg. 65) as to how the Act at present in force should be interpreted, it would be of use to examine the corresponding section of the previous enactments.

Section 396 of the Criminal Procedure Code, No. 15 of 1898 was the corresponding section to section 404 of the present Code of Criminal Procedure Act. Section 396 was as follows :

“The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive, and, the Supreme Court may in any case direct that any person be admitted to bail, or that the bail required by a Police Magistrate be reduced or increased.”

Section 396 of the Criminal Procedure Code, No. 15 of 1898 was considered in the case of *in re Ganapathipillai (supra)*, where the then Supreme Court interpreted the words ‘in any case’ to mean that the jurisdiction of the Supreme Court under section 396 to be revisionary and/or appellate as there is a condition pre-requisite for the exercise of such jurisdiction. The application in *Ganapathipillai (supra)* was for an order on the grant of bail. De Sampayo, J. in *Ganapathipillai (supra)* stated that the Court was bound by the views expressed in the case of *The King v Lokunona*⁽⁷⁾ which had examined section 396 of the Criminal Procedure Code of 1898. Learned Presidents’s Counsel for the respondent agreed that the interpretation given in *Ganapathipillai (supra)* had restricted the jurisdiction of the Supreme Court under section 396 of the Criminal Procedure Code of 1898 to be revisionary and/or appellate and further submitted that the law as it then stood as interpreted in the case of *Ganapathipillai (supra)* was therefore followed in the subsequent cases of *Kamusamy v Minister of Defence and External Affairs*⁽⁸⁾ and *Kanapathy v Jayasinghe*⁽⁹⁾, where section 396 of the Criminal Procedure Code of 1898 was given careful consideration.

Learned President’s Counsel for the respondent also contended that, the Criminal Procedure Code of 1898 was repealed by section 3(1)a of the

Administration of Justice Law, No. 44 of 1973 (hereinafter referred to as the AJL and although the new enactment basically adopted the provisions of the old Code, it had introduced new words with an attempt to expand the meaning of the relevant section, with a view to overcome the restrictive interpretation given to the words 'in any case' in *Ganapathipillai's (supra)* case. Section 103(4) of the AJL reads as follows :

“Notwithstanding anything contained in this section, the Supreme Court may in any case direct that any person be admitted to bail or that the amount of the bond fixed by any original Court be reduced or increased.”

Learned Presidents Counsel for the respondent, referring to the newly introduced words in section 103(4) of the AJL, which reads as '**notwithstanding anything contained in this Section**', submitted that it was intended to give a wider interpretation to the section in order to provide an opportunity for persons in custody to seek relief by way of an application for bail.

It is however to be borne in mind that section 103(4) of the AJL had not been interpreted by this Court as it was replaced within 6 years of its introduction by the present Code of Criminal Procedure Act. Accordingly it would not be of any assistance to this Court to examine the aforesaid provision of the AJL, having in mind the questions that are before this Court. However, it is of interest to note observations made by Prof. G. L. Peiris (Criminal Procedure in Sri Lanka, 2nd Edition 1998, PP. 152-152) in regard to the powers of the Supreme Court in respect of bail under the provisions of AJL, where he had stated that,

“Unlike the English Courts which have jurisdiction under the common law to made orders for bail in all cases, the Supreme Court of Sri Lanka has no comparable power. Its power and jurisdiction in this regard are conferred and regulated by statute - previously by the Courts Ordinance and the Criminal Procedure Code and today by the Administration of Justice Law.”

Consequently what is relevant and more important would be to consider the provisions stipulated in Section 404 of the Code of Criminal Procedure Act, which repealed and replaced the AJL in 1979. Section 404 of the present Code of Criminal Procedure Act reads as follows :

“The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive; and notwithstanding anything to the contrary in this Code or any other law the Court of Appeal may in any case direct that any person in custody be admitted to bail or that the bail fixed by the High Court or Magistrate be reduced or increased or that any person enlarged on bail by a Judge of the High Court or Magistrate to be remanded to custody.”

Learned Deputy Solicitor General for the appellants contended that section 404 of the Code of Criminal Procedure Act and section 396 of the Criminal Procedure Code of 1898 were similar. His contention was that the Court of Appeal in *Rev. Singarayer v Attorney General (supra)*, *Nithyanandan and Others v Attorney General*⁽¹⁰⁾ and the Supreme Court in *Benwell v The Attorney General and Another (supra)* had correctly stated the Judicial interpretation and view of the nature of the jurisdiction that has been vested in the Court of Appeal by section 404, that it does not vest 'original' jurisdiction in the Court of Appeal.

However, learned President's Counsel for the respondent took a contrary view on the submissions made by the learned Deputy Solicitor General for the appellants and submitted that the words '**notwithstanding anything to the contrary in this Code or any other Law**', which were absent in section 396, but are found in section 404 and their significance was overlooked by Court in coming to their conclusion in all the aforementioned decisions. Learned President's Counsel for the respondent further contended that the cases of *Rev. Singarayer (supra)* and *Benwell (supra)* are clear examples of judgments given by the failure to point out a significant change brought about in the law by the amendment of a section, perhaps due to an oversight or inadvertence and therefore the judge not having addressed his mind to the meaning that should be attributed to the said amendment. Therefore the learned President's Counsel for the respondent submitted that **Rev. Singarayer (supra)** and **Benwell (supra)** clearly are decisions 'per incuriam'.

Although the contention of the learned President's Counsel for the respondent is that in the decisions of *Rev. Singarayer's (supra)* and **Benwell (supra)**, the Court had not given its mind to the words 'notwithstanding anything to the contrary in this Code or any other law',

which were absent in section 396, but are found in section 404, a careful examination of these decisions clearly indicate that this is not so, as there is reference to the added words in section 404 of the Code of Criminal Procedure Act. For instance in *Benwell v The Attorney General* (supra) Sharvananda, C. J., was conscious about the addition of the words in section 404 of the Code of Criminal Procedure Act, when he stated that the Court of Appeal is empowered to exercise only appellate jurisdiction, as his Lordship had stated that,

“Counsel made reference to section 404 of the Code of Criminal Procedure Act, No. 15 of 1979 which *inter alia*, provides that ‘notwithstanding anything to the contrary in this Code or any other law the Court of Appeal may in any case direct that any person in custody be admitted to bail’. It was urged that in any event, the Court of Appeal, had powers under this section to admit the appellant to bail. In my view, this section does not support Counsel’s submissions. The expression ‘in any case’ can only refer to the cases referred to in the two previous sections, viz., 402 and 403 of the Code, and is not of general application. The Court of Appeal is empowered in the exercise of its appellate jurisdiction to admit any person in custody to bail in the cases referred to in section 402 and 403.”

Thus although section 404 of the Code of Criminal Procedure Act, was not considered in detail, it would not be correct to say that they have not considered the contents of the new section as the decisions in *Rev. Singarayer* (supra), *Nithyanandan* (supra) and *Benwell* (supra) correctly reflects the nature of the jurisdiction vested in the Court of Appeal by section 404, which is limited to appellate and revisionary jurisdiction.

Considering the submission made by the learned President’s Counsel for the respondent, it is not possible to accept that by the introduction of the term ‘notwithstanding anything to the contrary in this Code or any other law’, legislature had vested ‘original’ jurisdiction in the Court of Appeal in considering the grant of bail.

The decisions which had considered the vesting of jurisdiction pertaining to bail since *Ganapathipillai* (supra) had been unanimous in its outcome and the only difference in section 404 is the inclusion of the non-obstante

clause which was not in the previous sections it is settled law that the non-obstante clause will have to be read in the context of what the legislature conveys in the enacting part of the provision. (*Jyothiben Ramlal v State of Gujarat*⁽¹¹⁾ *Aswini Kumar v Arvinda Bose*⁽¹²⁾, *Union of India v Shrinbai* ⁽¹³⁾). Considering the effects of non-obstante clauses, Bindra states that,

“The proper way to construe a non-obstante clause is first to ascertain the meaning of the enacting part on a fair construction of its words. The meaning of the enacting part which is so ascertained is then to be taken as overriding anything inconsistent to that meaning in the provisions mentioned in the non-obstante clause It does not, however, necessarily mean that there must be repugnancy between the two provisions in all such cases. **The principal underlying non-obstante clause may be invoked only in the case of ‘irreconcilable conflict’** (Emphasis added).

As stated by *Sharvananda, C. J.* in *Benwell (supra)* the expression in section 404 could only be referred to in sections 402 and 403 of the Code of Criminal Procedure Act. Section 404 of the Code is contained in Chapter XXXIV, which deals with bail and consists of 7 sections from sections 402 - 408. It is to be noted that section 403 was amended by the Code of Criminal Procedure (Amendment) Act, No. 4 of 1993. Section 402 and the amended section 403(1) read as follows :

“402 - when any person other than a person accused of a non-bailable offence appears or is brought before a Court and is prepared at any time at any stage of the proceedings before such Court to give bail such person shall be released on bail :

Provided that the Court if it thinks fit may instead of taking bail from such person discharge him on his executing a bond without sureties for his appearance as herein after provided.”

403(1)- A Magistrate or a Judge of the High Court, at any stage of any inquiry or trial, as the case may be, may in his discretion release on bail any person accused of any non-bailable offence :

Provided that a person alleged to have committed or been concerned in committing or suspected to have committed or to have been

concerned in committing, an offence punishable under section 114, 191 and 296 of the Penal Code shall not be released, at any stage of any inquiry or trial, except by a Judge of the High Court.”

Considering the aforementioned sections, along with section 404 of the Code of Criminal Procedure Act, it is apparent that for the Court of Appeal to consider making a direction under section 404 there should be an order from the Judge of the High Court or a Magistrate.

Accordingly, when one considers all these provisions together having in mind the non-obstante clause in section 404, there is nothing to imply that the Court of Appeal has original jurisdiction with regard to granting of bail. In fact although not specifically stated, it appears that, Sripavan, J., in his judgment where the President of the Court of Appeal had agreed, had proceeded on the premise that section 404 vests only appellate and revisionary jurisdiction in the Court of Appeal. Moreover, although not specifically stated, it also appears that Sripavan, J. in his judgment had referred to the decisions in *Rev. Singarayer (supra)* and *Benwell (supra)*, in the light that the Court of Appeal could exercise appellate and revisionary jurisdiction in terms of section 404 of the Code of Criminal Procedure Act. Thus in his judgment, Sripavan, J., after making reference to *Rev. Singarayer's case (supra)* and *Benwell's case (supra)* had quoted from the judgment of Sharvananda, C. J. in *Benwell's (supra)* case. Thereafter he had stated that,

“As averred in paragraph 27 of the petition, the Magistrate has refused to grant bail to the petitioner. **Hence, the existence of an order of an original court was in force at the time the petitioner made this application, for this court to exercise its jurisdiction (emphasis added).**”

Paragraph 27 of the petition dated 26.01.2004 to the Court of Appeal stated thus :

“However, the learned Magistrate disallowed the objections raised on behalf of the petitioner stating that there was no need to file a fresh or amended report by the Police despite the death of the 1st accused and fixed the matter for the 30th January, 2004 to determine whether charges would be framed against the petitioner as required by section 182 of the

Code of Criminal Procedure Act. Further the learned Magistrate whilst stating that he appreciated the presence of the petitioner in Court despite his present condition, **but that he was unable to grant bail in view of Section 47 of the Immigration and Emigration Act, remanded the petitioner to fiscal custody until 30th January 2004. A true copy of the said order is annexed hereto marked 'P15' (emphasis added).**"

Accordingly, it is apparent that *Sripavan, J.* had considered the respondent's application having identified a 'bail refusal order' by the learned Magistrate on 19.01.2004 and thereafter had considered the matter on the premise that section 404 vests only appellate and revisionary jurisdiction in the Court of Appeal. Learned Deputy Solicitor General submitted that there were two discrepancies between the Sinhala and the English versions of section 404 and that the Sinhala version gives section 404 a restrictive interpretation. These discrepancies were that, in the Sinhala text the words 'මිනැම අවස්ථාවක' is given whereas in the English text this is stated as 'in any case' and the word, 'යම් තැනක්කකු' which is given in the Sinhala text, appears as 'any person' in the English text. Whilst agreeing with the submission of the learned Deputy Solicitor General that there exist these two discrepancies, it is to be borne in mind that there are also other such discrepancies when the Sinhala and English texts of section 404 are compared.

However, the applicable text in terms of Article 23(3) is quite clear in this regard, as it provides that the law published in Sinhala shall as from the date of such publication be deemed to be the law and supercede the corresponding law in English. Further, in terms of Article 23(1) of the Constitution in the event of any inconsistency between any two texts, the text in the Official Language should prevail. In such circumstances although there are differences between the English and Sinhala texts, it would not be necessary for the purpose of this appeal to venture into a detailed examination of the differences between the aforementioned two versions.

Accordingly it is apparent that in terms of the section 404 of the Code of Criminal Procedure Act, the Court of Appeal has only the appellate and revisionary jurisdiction.

Having considered the effect of section 404 of the Code of Criminal Procedure Act, let me now turn to examine the applicability of section 47(1) of the Immigrants and Emigrants Act.

(B) Whether section 47(1) of the Immigrants and Emigrants Act serves as a prohibition on the Court of Appeal to consider granting bail to a person accused of an offence under section 45 of the Immigrants and Emigrants Act ?

Learned Deputy Solicitor General took up the position that in terms of section 47(1) of the Immigrants and Emigrants Act, bail was denied to persons accused of offences contained in that section. The contention of the learned Deputy Solicitor General is that the term 'shall' carries with it a mandatory obligation on all courts and the parliamentary proceedings also reveal that the intention of the legislature was clearly to ensure that by the use of the terms 'non-bailable', persons accused of offences contained in that section be denied bail in the literal sense of the English word 'non-bailable.' He also took up the position that section 47(1) of the Act as amended, overrides the provisions of section 404 of the Code of Criminal Procedure Act, since the former belongs to specific law and the latter falls within the category of general law.

Section 47(1) of the Immigrants and Emigrants Act, No. 20 of 1948, as amended states as follows :

“Notwithstanding anything in any other law—

- (a) every offence under paragraph (a) of sub-section (1) of section 45;
- (b) every offence under sub-section (2) of section 45 in so far as it relates to paragraph (a) of sub-section (1) of that section;
- (c)
- (d)
- (e)

shall be non-bailable and no person accused of such an offence shall in any circumstances be admitted to bail.”

Section 45 of the Act was amended by Act, No. 42 of 1998 to include the offence in respect of which the respondent was charged and section 47 was also amended to include the aforementioned new offences, which were brought in under section 45 and these were listed under the category of 'non-bailable' offences in terms of section 47 of the Act.