

**TYRON PERERA
VS
ATTORNEY GENERAL**

COURT OF APPEAL,
BALAPATABENDI. J.
W. L. R. SILVA, J
CA (PHC) APN 7/2005.
JUNE, 28, 2005

Criminal Procedure Code - S404- Application for Bail pending appeal - Hearing of appeal will take a considerable period of time - Is it a ground? -Are exceptional circumstances necessary - Constitution - Art 12 (1)

The accused made an application for bail under S404. The only ground urged was that the hearing of the appeal will take a considerable period of time.

HELD:

- (1) The application under S404 is misconceived. (The State however agreed to treat this matter as an application in Revision)

Held further:

- (2) The sentence imposed on the accused is 7 years rigorous imprisonment and the mere fact that the hearing is not likely to take place for some time is itself no ground to enlarge the accused on bail.
- (3) Release on bail pending appeal will only be granted on exceptional circumstances - there are no exceptional circumstances.
Per W. L. Ranjith Silva, J.
"A fortnight or a month during 1969 can be compared to a year or two according to the current state of affairs prevailing in our country".

Application for Bail pending appeal.

Cases referred to :

1. Benwell vs. Attorney General - 1988 1 SLL R 1
(a) In Re Kamal Addararachchi CA (PHC) APN No. 10 of 1995 H. C. 7710/96
2. Kamal Addararachchi Vs. State - 2000- 3 Sri LR 393
3. Queen Vs. Cornelis Silva - 74 NLR 113
4. Queen Vs. Perera 62 NLR 238
5. Thomodaram Pillai Vs. Attorney General - CA 141/75
6. Ranatunga Arachchilage Peter Vs. A. G. - CA 450/95 CAM 2.8.95
7. Salahudeen Vs. A. G. 77 NLR 262

Prince Perera for accused.

Riza Hamza SC for Attorney General.

cur.ad.vult.

July 22, 2005

W. L. Ranjith Silva, J.

This application for bail under S. 404 of the Criminal Procedure Code is misconceived. S. 404 cannot be invoked in the exercise of the jurisdiction of this court in an instance of this nature where the refusal of bail pending appeal by the High Court of Colombo by its order dated 16.12.2004 is being challenged. (*Vide* Benwell vs Attorney General at 1)

When this matter came up for inquiry before this Court on the 28.06.2005 Mr. Hamza State Counsel appearing for the Attorney General agreed to treat this application as if it were an application for revision and to proceed with the same.

In this case the accused was convicted for attempted murder on 24.09.2004 for an offence punishable under S 300 of the Penal Code and

was sentenced to 7 years rigorous imprisonment. An application for bail pending appeal was made to the High Court of Colombo on 15.10.2004 after nearly 21 days of the conviction and the Learned High court Judge made order refusing the said application for bail on 16.12.2004. At the time the Accused had been on remand for a period less than three months.

The Petitioner has stated in his petition that he adduced the under mentioned facts in his bail application presented to the High Court. They are as follows.

- (A) The petitioner was convicted on 24.09.2004 and since then he is on remand.
- (B) He appeared before Court on all dates of hearing
- (C) The hearing of the appeal by the Court of Appeal is likely to take a considerable period of time, in addition to the time taken to prepare the appeal brief.
- (D) In the event of this appeal being allowed by the Court of Appeal on the basis of the misdirection made on the law by the Learned High Court Judge, it would be unreasonable if the accused were to be on remand for a long period of time.
- (E) The petitioner is 34 years of age ; he has two school going children aged 12 and 15 years respectively, and that he is the sole bread winner of his family
- (F) He is so poor and is unable to find the money to retain counsel to plead his case in the Court of Appeal.

The Learned High Court Judge refused to grant bail as he was of the view that none of the grounds adduced by the petitioner amounted to exceptional circumstances warranting the grant of bail pending appeal.

On a perusal of the proceedings of 16.12.2004, in the High Court of Colombo I find that the counsel for the petitioner confined himself to making submissions in respect of only item (C) mentioned above that is, that the hearing of the appeal in the Court of Appeal is likely to take a considerable period of time in addition to the time taken to prepare the

appeal briefs. The Learned High Court Judge after hearing the submissions of both parties refused to grant bail on the ground that the petitioner failed to establish exceptional circumstances. In this Court too the Petitioner relied mainly on the same ground alleged in item (C). Now the function of this court acting in revision is to decide as to whether the order made by the Learned High Court Judge was illegal, unreasonable, *ultra vires* or the like in the light of the arguments adduced before, and the material made available, to the Learned High Court Judge. Since this is not a fresh bail application, this court acting in revision cannot and should not unless there are special reasons to do so, consider fresh matters or arguments based on additional grounds touching the facts of the case, which were not presented or adduced before the Learned High Court Judge, in deciding whether the order made by the Learned High Court Judge was right or wrong, legal or illegal.

Now I shall deal with the issue whether the delay in the preparation of the appeal brief and the fact that the appeal is likely to take a long time could be treated as constituting exceptional circumstances that warrant the grant of bail pending appeal.

In the famous case of Kamal Addararachchi⁽¹⁹⁾ J. A. N. De Silva, J. observed thus "from our experience in this case we note that it will at least take over one year for this appeal to be taken up. We have already fixed appeals up to September and we have to give priority to cases involving death sentences and life imprisonment. In these circumstances we hold that it would be appropriate to enlarge the accused appellant on bail pending appeal".

In that judgement no judicial precedents were cited as to the law as it stood prior to the decision in that case. Yet the order in that case could be justified on the extraordinary circumstances endemic to that case. If one were to peruse the judgement delivered by Hecter Yapa, J. in Kamal Addararachchi Vs The State⁽²⁾ it could clearly be seen what these special circumstances are. His Lordship, observed at various stages, in the course of his judgement (Kulathilake, J. agreeing) as follows,

"No court should try to molly coddle a witness as has happened in this case." (Vide page 32 of the judgement)

"Suffice it to state that those factual misdirections have caused serious prejudice to the Accused Appellant.." (Vide page 34 of the judgement)

"therefore by reason of the trial judge misdirecting herself on the law as stated above..." (vide page 36 of the judgement)

Even though the petitioners cannot be legally permitted to pre-empt the main appeal by canvassing the correctness of the judgement and to rely on the weakness of the prosecution case in a bail pending appeal application as the weakness of a case is not a ground to enlarge an accused on bail pending appeal the serious and transparent lapses which deprived the accused of a fair trial enshrined in Article 12(1) of the Constitution I suppose, prompted their Lordships in granting bail as those lapses appearing on the face of the record were manifestly illegal, unreasonable and amounted to a blatant violation of the fundamental rights of the accused in that case.

In Kamal Addarachchi's case, the accused was a popular movie star in Sri Lanka, whose life and future was in this country. He would be completely lost in a foreign country. Therefore it could be safely assumed that he will not desert this country but would be available to serve the sentence in case has lost his appeal. This fact too I believe would have been in the forefront of their Lordships minds when they decided to grant bail to the accused in that case.

In *Queen Vs Cornelis Silva*⁽²⁾ it was held by Weeramanthri J. I quote "Release on bail pending appeal will only be granted on exceptional circumstances. Where the sentence is a long one the mere circumstances that the hearing of the appeal is not likely to take place for a fortnight or a month is of itself no ground for the grant of bail"

A fortnight or month during 1969 can be compared to a year or two according to the current state of affairs prevailing in our country.

In *Queen Vs Perera*⁽³⁾ it was held that delay likely to ensue in preparation of a brief owing to the production of a large number of exhibits in a case where over 100 witnesses were examined and more than 400 exhibits were produced, was not a reason for the grant of bail.

The court in refusing bail reiterated the principle that the grant of bail by the Court of Criminal Appeal was an exceptional and unusual course.

In granting bail pending appeal the overriding consideration should be whether the accused will present himself to serve the sentence imposed on him if the appeal is dismissed. In⁽⁶⁾ *Thamodaran Pillai's* case it was held that one aspect to be considered in a bail pending appeal case is that whether the accused will be available to serve the sentence if he is granted bail. In that case the sentence imposed on the accused was on of 7 years rigorous imprisonment. In *Ranatunga Arachchilage Peter Vs. A. G.*⁽⁶⁾ it was held referring to *Salahudeen Vs. A. G.*⁽⁷⁾ that when an accused is convicted of culpable homicide not amounting to murder and sentenced to 3 years rigorous imprisonment, that should not be considered as an exceptional circumstance to grant bail. In *Queen Vs Cornelis Silva* (supra) where the accused was convicted of attempted murder and sentenced to 4 years rigorous imprisonment was held to be a sentence long enough not to grant bail. In *Ranatunga Arachchilage Peter Vs. A. G.* (supra) the fact that the appeal will take a long time, the fact that the accused is the sole bread winner, the fact that the accused had been on remand for a long period of time, were not considered as forming exceptional circumstances. Even the fact that the conditions of the bail bond have not been violated cannot be taken as constituting exceptional circumstances.

In this case the sentence imposed on the accused is 7 years rigorous imprisonment and the mere fact that the hearing isn't likely to take place for some time is of itself is no ground to enlarge the accused on bail. The other reasons relied on by the petitioner as forming exceptional circumstances scarcely bear examination.

For the reasons adumbrated, I am of the view that the Learned High Court Judge was quite correct when he refused to grant bail pending appeal as there were no exceptional circumstances adduced before him warranting the release of the accused on bail pending appeal.

Balapatabandi, J.

I agree only on the point that there are no exceptional circumstances averred by the Petitioner, in his petition to grant bail pending appeal.

Application dismissed.