1963 *Present:* Sansoni, J. (President), H. N. G. Fernando, J., and L. B. de Silva, J.

THE QUEEN *v.* D. J. F. D. LIYANAGE and others

TRIAL AT BAR No. 2 OF 1962

In the Matter of an Application for Bail

Trial at Bar—Application for bail—Factors that should be considered before granting bail—Treatment of persons arrested on detention orders made under Emergency Regulations—Penal Code, s. 115—Regulations made under Prisons Ordinance—Public Security Act.

Where, in a Trial at Bar, the defendants applied to be enlarged on bail pending the trial of the case—

Held, that bail should not be granted having regard to the nature of the offences charged and the penalty fixed by law and the fact that the trial had already begun.

Observations on the desirability of using the relevant Regulations framed under the Prisons Ordinance as a guide for civilized and humane treatment of persons arrested on detention orders issued under Emergency Regulations framed under the Public Security Act.

APPLICATIONS for bail made by the defendants in a Trial at Bar.

Counsel heard: For the Defence:—*G. G. Ponnambalam, Q.C., E. G. Wikramanayake, Q.C., A. H. C. de Silva, Q.C., R. A. Kannangara, S. J. Kadirgamar.*

For the Crown:—*D. St. C. B. Jansze, Q.C.*, Attorney-General.

Cur. adv. vult.

ORDER

February 5, 1963. [*Read by* SANSONI, J.]—

The 24 defendants before us have all applied to be enlarged on bail pending the trial of this case.

Each petition is supported by an affidavit sworn or affirmed by the particular defendant before a Justice of the Peace. When the Attorney-General was called upon to reply to the submissions made by counsel for the defendants, he took the legal objection that the Court cannot act on the affidavits because they do not comply with the provisions of Section 428 of the Criminal Procedure Code. He supported his objection

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by referring to the case of The *King v. Wijeratnam* [1]. Undoubtedly, that judgment is authority for his submission that the affidavits are not properly before this Court. We do not think, however, that the applications, concerning as they do the liberty of these defendants, should be rejected summarily on this account. We think that a legal objection of this nature should have been taken at the commencement of the hearing, in order that affidavits sworn before duly authorised persons might have been tendered.

Before Counsel made their submissions we indicated that we wished them to confine their arguments to the question whether this was a case in which bail should be granted having regard to the nature of the offences charged and the penalty fixed by law, and the fact that the trial had begun. We reserved for future consideration a further question which would arise, in the event of our holding on the merits that bail should be granted. That question is whether this Court has the power to admit the defendants to bail without the consent of the Attorney-General. We took that course because we thought that if, upon a consideration of the merits, we formed a view favourable to the defendants, it would be of some assistance to the Attorney-General if his consent became relevant.

Mr Ponnambalam, in his address, outlined the history of the arrest and subsequent custody of the defendants. According to him, all but three of them were arrested between 28th January and 6th February, 1962, on detention orders issued by the Permanent Secretary to the Minister of External Affairs under Emergency Regulations framed under the Public Security Act. The 23rd and 24th defendants were arrested on 18th June, while the 6th defendant surrendered to Court on 31st July. All of them, except the 6th defendant, were detained under the Regulations from the date of their arrest until 18th July. On 18th July, they were remanded to Fiscal's custody where they remained until 3rd October. On 3rd October, they were again detained under detention orders until 16th January last. From that date they have been in Fiscal's custody.

The first information in this case was exhibited on 23rd June, 1962. After lengthy arguments, the first Court of three Judges held on 3rd October that they had no jurisdiction to try the case. The second information was exhibited on 21st November 1962, and the second Court which sat to try the case ruled that it was not properly constituted. The present Court was then named by the Chief Justice.

The first ground on which the present applications for bail are based is that the physical and mental condition of the defendants has deteriorated considerably since their arrest. Mr Ponnambalam complained that they had been kept in solitary confinement from the time of arrest until 18th July 1962, in cells the dimensions of which were only 6 feet by 10 feet, for more than 22 out of every 24 hours. Mr A. H. C. de Silva also

[1] *(1941) 43 N. L. R. 26.*

complained of this, and he pointed out that such a long period of solitary confinement was bound to affect them. The Attorney-General conceded that it was only after one month had elapsed that the Defendants were allowed to see visitors, and then only for 15 minutes once a week ; and that they were allowed only half an hour a day in the open air. Even their meals were served to them in their cells.

If the facts are anything like those mentioned by Counsel for the defendants, we cannot but be shocked by the treatment accorded to their clients. We were referred to the Indian Penal Code and Gour's Commentary on Sections 73 and 74 which deal with the punishment of solitary confinement. These defendants, it need hardly be said, have not been convicted of any offences, and no question of punishment has yet arisen. In India, under a sentence of solitary confinement, a prisoner cannot be confined for more than 14 days at a time, with intervals of not less duration between the periods of solitary confinement. The sentence has, moreover, been reserved in India for hardened criminals, and as a punishment for atrocity or brutality. The Regulations framed under the Prisons Ordinance, Cap. 44, provide for the civilized and humane treatment of both convicted prisoners and prisoners under remand, and it would be well if they were allowed to serve as a guide.

We now pass on to the consideration of the first ground urged. Whatever may have happened earlier, what we have to consider on these applications is the present physical and mental condition of the defendants. On this point, apart from their affidavits which state that medical attention has been rendered to several of them, that one of them had received the attention of a psychiatrist as well, and that two of them had been admitted to hospital, we have no expert medical evidence before us about the condition of any single defendant. Nor have we evidence as to how dangerous it would be to their health to let any of them remain in Fiscal's custody. While we sympathise with them in respect of the conditions under which, and the period for which, they were held in solitary confinement, we do not feel that we have sufficient material before us to enable us to say that their present health demands that they be released on bail.

In considering an application for bail, a Court follows well-settled principles which have been laid down from time to time. Even if our discretion to grant bail is unfettered, it must still be judicially exercised. The main question that the Court must consider is whether it is probable that the defendant will appear to stand his trial and not abscond. The cases seem consistently to lay down three considerations which should be taken into account in answering that question.

The first is, what is the nature of the crime ? Is it grave or trifling ? Now the defendants are charged with three offences punishable under Section 115 of the Penal Code, with having conspired with others (1) to wage war against the Queen, (2) to overawe by means of criminal force or the show of criminal force the Government of Ceylon, and (3)

to overthrow otherwise than by lawful means the Government of Ceylon by law established. Each of these offences was, at the date of the alleged offences, punishable with imprisonment for 20 years and a fine. It was therefore always regarded as a grave crime.

The second consideration is the severity of the punishment upon conviction. The punishment they are now liable to, albeit enacted retrospectively, is death, or imprisonment for at least 10 years and at most 20 years, and forfeiture of property. It has been said that when a man is on trial for life he has a very strong motive to abscond—even though it is a case where it is improbable that the death penalty would be inflicted. The Attorney-General submitted that a release on bail might afford to the defendants an opportunity to attempt some conspiracy to take control of the forces of the State, and thereby to avoid trial upon the charges now pending. In the circumstances, we cannot say that there is no substance in that submission. It was urged for the defendants that, since trial *in absentia* is permitted in this case, it is not likely that they will abscond for if they abscond they do so at their peril. We do not think that this factor outweighs the others to which we have referred.

The third consideration is the probability of a conviction, or the nature of the evidence to be offered by the prosecution. In this case the Attorney-General has exhibited an Information instead of proceeding by way of indictment. There is no evidence which has been led before any court. The Attorney-General has, however, tendered a Statement of Facts which, we assume, is based upon the statements of witnesses recorded in the course of the investigation into the alleged offences. This Statement of Facts cannot be disregarded, seeing that it is the Attorney-General who has taken the responsibility of tendering it. It is improbable that it would have been prepared unless there were statements of witnesses to support it. We are not to be understood as pronouncing any opinion on the veracity of those statements. We only say that there appears to be a foundation for the filing of the Information, although its stability has yet to be duly tested.

Counsel for the defendants have complained that there is no indication in the Statement of Facts as to how the case is going to be proved against the defendants. We think that this argument really touches on another question, viz., whether the defendants would be prejudiced in making their defence, if they were provided only with this Statement of Facts. That question will be raised, no doubt, at a later time.

Much stress was laid in the arguments of Counsel for the defendants on the presumption of innocence and the liberty which an individual is entitled to. This Court will never cease to safeguard the liberty of the subject. "The favour shown to freedom" will always influence Judges who approach questions affecting that liberty. But it is not to be thought that the grant of bail should be the rule and the 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 is prima facie weak : see *Joglekar v. Emperor* [1] ; and *P. C. Dandagamuwa 12412* [2]. The law has empowered the Attorney-General to exhibit an Information in a case such as this. In this respect there has been a fundamental departure from the English Law relating to Informations filed by the Attorney-General, but we as judges are not concerned with questions of policy.

Complaint was also made in regard to the delay in filing the respective Informations and in commencing this trial. From what we have said in an earlier part of this judgment, it will be seen that five months have elapsed between the commission of the alleged offences and the filing of the first Information, and this trial has started one year after the offences are alleged to have been committed. Delay is always a relative term, and whether there has been excessive delay always depends on the circumstances of the case. We have been informed that there were over 300 witnesses listed for the prosecution. To question them and record their statements many months would be needed, and thereafter the Attorney-General would need time to consider the drafting of the charges. It is not for us to say where the blame lies that two Courts have already sat without hearing the case. Where delay in bringing a man to trial is so great as to amount to oppression, a Court will interfere and admit him to bail, see *R. v. O/C Depot Battalion R. A. S. C.—ex parte Elliott* [3]. We do not think that this is a case in which we should take that course.

Counsel for the defendants urged that, by reason of being kept on remand, the defendants cannot secure financial resources for the conduct of their defence. Allied to this was a complaint that while on remand they cannot secure information, evidence and other material for their defence. In considering these submissions, we cannot ignore the consideration that this trial has now begun, and except for short adjournments which may become necessary for various reasons it will go on continuously until it is concluded. The presence of the defendants in Court during the greater part of each day is therefore essential. They are all defended by Counsel who would by now have received instructions and who can, no doubt, be further instructed. In these circumstances, we do not see how, by admitting the defendants to bail, we can make it easier for them to get financial assistance or secure evidence.

Stress was laid on the character and the social and professional position of the defendants. It is doubtful whether the character of a defendant is relevant in a matter like this. It is, perhaps, a relevant consideration

[1] *A. I. R. (1931) All. 504.* [2] *(1933) 2 C. L. W. 246.*

[3] *(1949) 1 A. E. R. 373.*

that they are men who have held influential positions, some in the Navy or Army, some in the Police Force or in other walks of life. We doubt if this circumstance helps them in these applications.

For the reasons given we dismiss all the applications for bail.

(Sgd.) M. C. SANSONI,
Puisne Justice.

(Sgd.) H. N. G. FERNANDO,
Puisne Justice.

(Sgd.) L. B. DE SILVA,
Puisne Justice.

Applications dismissed.