

“Bail”, A Critical Analysis of Recent Development in Law of Bail

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*“To procure the release of a person from legal custody, by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction and judgment of the Court To set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and a place certain, which security is called “bail,” because the party arrested or imprisoned is delivered into the hands of those who bind themselves for his forthcoming, (that is, become bail for his due appearance when required,) in order that he may be safely protected from prison.”- Wharton. *Stafford v. State*, 10 Tex. App. 49.*

Introduction

Bail is not intended as a punishment in itself. It is rather a way of securing an accused agreement to abide by certain

conditions and return to Court. In that sense, Bail is like collateral left with the Court to ensure that, after the accused release from remand, he or she will appear in courts for the remaining parts of their case. If the accused fails to appear or violates the conditions of the release, he or she might forfeit the amount paid. There is no statutory definition to define “Bail” in Sri Lankan law.

However, according to the Black’s Law dictionary “Bail” defines as “procuring release of one charged with an offence by ensuring his future attendance in Court and compelling him to remain within the jurisdiction of that Court”¹. Bail has been defined by Court of Sri Lanka as the

¹ Blacks law Dictionary

“release or setting at liberty of a person arrested or imprisoned either on his own recognizance or upon others becoming sureties for his appearance on a future date”². Nowadays law concerning bail has much more preference than any other matter in Sri Lankan Judicial System.

Bail Act No.30 Of 1997

The introduction of the Bail Act No.30 of 1997 made a huge difference in the Criminal law. The Objective of the new Act and the intention of the legislature is given in the preamble of the Act. It states as follows “An Act to provide for release on bail of persons suspected or accused of being concerned in committing or having committed an offence; to provide for the granting of anticipatory bail and for matters connected therewith or incidental thereto.”³ It is clear that the main intention of introducing this Act is to consolidate the law relating to bail, to introduce the concept of anticipatory bail

and to make provisions for matters connected to it.⁴

Before the enactment of the Bail Act it was the Code of Criminal Procedure Act No.15 of 1979 which provides all the legal provisions related to bail. This Act provides provisions of bail for any person surrenders himself or is produced on arrest on allegation that has committed or has been concerned in, committing, or is suspected to have committed or to have been concerned in committing an offence until the conclusion of the trial.

However, this Bail Act No.30 of 1997 has exceptions, according to the provisions of this Act it does not apply in respect of offences committed under certain laws. According to Section 3(1) of the Act Nothing in this Act shall apply to any person accused or suspected of having committed, or convicted of an offence under, the Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979, Regulations made under the Public Security

²*Kanapathy V Jayasinghe*(1964) NLR 549 at p.551, per Alles J

³ Bail Act No.30 of 1997, Preamble

⁴Kalinga Indatissa, *Law Relating to Bail in Sri Lanka and A Commentary on the Bail Act* (1stedi,Lassana Press Pvt Ltd,2005) 5-8

Ordinance or any other written law which makes express provision in respect of the release on bail of persons accused or suspected of having committed or convicted of offences under such other written law⁵.

According to this section it is clear that a provision of the Bail Act does not apply to a person who is arrested under one of the three categories listed below. First for the persons who are arrested under the Terrorism Act No.48 of 1979. Secondly under the Regulations of the Public Security Ordinance and thirdly under any other law which contains express provisions relating to granting of bail to suspects and convicts who are convicted for an offence under any such law. There was a slight confusion regarding the Sinhala interpretation of the Section 3(1) as it conveyed a different meaning. According to the Sinhala text it showed that only Prevention of Terrorism Act and the Public Security Ordinance is excluded from the terms. But however from the third part of the Section 3(1) it states that any other

⁵ Bail Act No 30 of 1997, Section 3(1)

written law which expressly states about bail which means it also excludes Immigrants and Emigrants Act No.20 of 1948 amended by No.16 of 1955, Offensive Weapons Act No.18 of 1966 and Poisons, Opium and Dangerous Drugs Ordinance, Customs Ordinance, Fire Arm Ordinance , Bribery Act and Victims and Witness Protection Act No.4 of 2015. In the case of *Thilanga Sumathipla V Inspector General of Police*⁶, Abeyratne J stated that this in effect excludes, application of the Bail Act to the three categories of offenders cited in the earlier three instances who come within the purview of the three Acts in contemplation. Section 3 states thus: The Acts referred to are: Firstly, the Prevention of Terrorism Act, No.48 of 1979 (Temporary Provisions Act) and secondly, Regulations made under the Public Security Ordinance. Four categories of offenders are in Contemplation-Having committed an offence, convicted of an offence, accused of an offence, suspected of an offence. The Sinhala Act refers to these four stages of offenders, as being regulated by written

⁶(2004) 1 SriLR p. 210

law, (who are excluded from the purview of the Bail Act No.30 of 1997. All others are encompassed under the provisions of the Bail Act with wide ranging effect.

Accordingly, the judgment given in the above-mentioned case was that provisions of the Bail Act only exclude the Prevention of Terrorism act and the Public Security Ordinance. Therefore, Thilanga Sumathipala who was charged under the Immigrants and Emigrants Act fell under the provisions of the Bail Act and was entitled to get bail under the Bail Act No.30 of 1997.

However, in the case of *Shiyam V Officer-in-charge Narcotics Bureau and another*⁷, Shirani Bandaranayake J held that the *eusdem generis* rule had no application and Section 3(1) permitted the prohibition under the Section 83 of the Poisons, Opium and Dangerous Drug Act against bail. As such, the Section 83 restriction against bail was operating despite Section 3(1) of the Bail Act. It was also held that in case of doubt, it is competent to look at parliamentary debates on Acts to ascertain

⁷(2006) 2 SriLR 156, (2006) BLR 52 SC

the intention of the law. According to recent judgments, the debates in parliament on the Bail Act shows that bail under that Act was not available to a person accused of an offence underwritten law in the nature of Section 83 of the Poisons, Opium and Dangerous Drugs Ordinance restricting bail and not necessarily limited to written laws dealing with public order. The important decision given by Justice Shirani Bandaranayake provides a clear picture as to the persons who fall under the purview of the Bail Act and the people who does not. If a person has committed or has been concerned in committing, or is suspected to have committed or to have been concerned in committing an offence under any written law which expressly states the provisions of bail, Bail Act No.30 of 1997 has no applicability for such person.

According to the Section 16 of the Bail Act, subject to the provisions of Section 17, unless a person has been convicted and sentenced by a Court, no person shall be detained in custody for a period exceeding twelve months from the date of his arrest.

According to the Section 17, period of detention can be extended on application made in that behalf by the Attorney General at the High Court Holden in any zone or a High Court established under Article 154P of the Constitution may, for good and sufficient reasons that shall be recorded, order that a person who has not been convicted and sentenced by a Court, be detained in custody for a period in excess of twelve months: Provided that the period of detention ordered under this section, shall not in any case exceed three months at a time and twelve months in the aggregate.

In the case Hettiarachchige Jayawathi V Attorney General⁸ it has stated that this extension of the period is subjected to the provisions in the Section 14 which states that whenever a person suspected or accused of being concerned in committing or having committed a bailable or a non-bailable offence, appears, is brought before or surrenders to the Court having jurisdiction, the Court may refuse to release any such person on bail or upon an

⁸ CA 189/2004 CAM 274/2006

application being made in that behalf by a police officer, and after issuing notice on the person concerned and hearing him personally or through his attorney-at-law, cancel a subsisting order releasing such person on bail if the Court has reasons to believe that the person would not appear to stand his inquiry or trial or interfere with the witnesses or the evidence against him or otherwise obstruct the course of justice or commits an offence while on bail or that the particular gravity of, and public reaction to, the alleged offence may give rise to public disquiet.

However this judgment was overruled by the case Wickramasinghe V Attorney General and another⁹. In this case Sisira de Abrew J held that the purpose of remanding an accused is to ensure his appearance in Court on each and every day that the case is called in Court, if the Court feels that, he would appear in Court after his release on bail Court should enlarge him on bail. Court should not remand an accused in order to punish him. Section 14, section 16, Section 17 of the Bail Act do not

⁹ 2010SLR1V141

state that 'Notwithstanding anything contrary in the provisions of the Act-but section 16 states 'subject to the provisions of section 17, and it does not state subject to the provisions of section 14. Therefore, section 16 and section 17 are not subjected to section 14. When one considers Section 3 and section 16 it is clear that the accused to whom the Bail Act does not apply can be kept on remand for a period exceeding two years but not the suspects to whom the Bail Act applies.

Sisira de Abrew J further held that the maximum period that a suspect to whom the Bail Act applies can be kept on remand is 2 years, the period of 2 years is considered only if the Attorney General acts under Section 17. If there is no application under Section 17 the maximum period that an accused to whom the Bail Act applies can be kept on remand is one year.

The considerations which induce a judge to refuse to order the release of an accused on bail before trial will often render it inexpedient to release the same accused

after conviction. Indeed, there are all the more reasons for keeping him in the custody after the charge has been proved, for the temptation to abscond is all the stronger. Moreover, there is a greater likelihood, in some cases, of the offence being repeated¹⁰. Under the previous law, an accused who had been convicted by a Magistrate or District Judge was entitled as of right to be released on bail if he was in custody. Even habitual criminals enjoy this right. It was certainly anomalous that an accused who, it was thought, should be kept in custody until his case is decided could demand as of a right that he should be released upon his conviction. Many instances have come to our notice of convicted persons, released on bail pending appeal, taking the opportunity to commit further offences in the interval"¹¹.

Section 19 and Section 20 of the Bail Act provides the current provisions related to bail pending appeal. According to the Section 19, it provides provisions of bail in

¹⁰G.L.Peiris, *Criminal Procedure in Sri Lanka* (2ndedi, Stamford Lake Pvt Ltd) 142- 164

¹¹ Final Report,pp 41-42, paras 142-144,

respect of a person convicted by a Magistrate Court and Section 20 provides provisions for granting bail relating to suspects convicted by High Court. According to the Section 19, Magistrates has power to release a convict on bail after the trial who is convicted until the appeal is pending. Furthermore, it is the same for the High Court under the Section 20 of the Act. When the bail is rejected at the preliminary stages of the case it is of the normal procedure to go for a revision or submitting a fresh bail application to the Court of Appeal under the Section 404 of the Criminal Procedure Code.

However, the Bail Act does not specify the circumstances under which the High Court should grant bail for a person found guilty until the appeal is over. It is said that a person can be released on bail in High Court only if there are exceptional circumstance. The concept of exceptional circumstances has never been a statutory requirement. We only can get a clear picture about the concept of the exceptional circumstances by referring to the case law. Moreover, according to the

Section 10 of the Assistance to and Protection of Victims of Crime and Witnesses Protection Act No.4 of 2015, an offence under Section 8 or 9 shall be cognizable and non-bailable and no person suspected, accused or convicted of such and offence shall be enlarged on bail, unless under exceptional circumstances by the Court of Appeal. In the case of Ramu Thamotharanpillai V Attorney –General¹² it was decided that the bail should only be granted if there are exceptional circumstances. With the development of Bail Act No.30 of 1997 it was said that the concept of exceptional circumstance has been abolished by the appeal Courts. It was decided in the case of Attorney General's V Ediriweera¹³ that the norm is that bail after conviction is not a matter of right but would be granted only under exceptional circumstances: in an application for bail after conviction, the appellate Court should not pre-empt the hearing of the substantive appeal and pronounced upon merits of the appeal. It is further decided that exceptional circumstances only exist when

¹² (2004) 3 SriLR 180

¹³BLR 2006

the facts and circumstances of the case are such that they constrain or impel the Court to conclusion that justice can only be done by the granting of bail, only then should be bail granted after the conviction. Sri Lankan law has given a broad interpretation for the term exceptional circumstances in bail in several decided cases and it should be decided as per the facts and circumstances of the case.

The next major area in law relating to bail is the concept of Anticipatory bail. This concept was alien to the Sri Lankan law until it was introduced by the Bail Act No.30 of 1997. The concept of 'anticipatory bail' means that a person who has reason to believe that the authorities require him for the purpose of an offence and that where there is a material to believe that he may be arrested immediately, any such person could make an application to the relevant Court to obtain bail prior to his arrest. According to Section 21 When any person has reason to believe that he may be arrested on account of him being suspected of having committed, or been concerned in committing, a non-bailable offence he may

with notice to the officer in-charge of the police station of the area in which the offence is alleged to have been committed, apply to the Magistrate having jurisdiction over the area in which such offence is alleged to have been committed, for a direction that in the event of his arrest on the allegation that he is suspected of having committed, or been concerned in the commission of, such offence he shall be released on bail. This application should be in the form of an affidavit. Upon receiving the application, the Court should fix a date for inquiry, the date shall not be later than seven days from the date of the application, and shall issue notice of such date to the applicant and the officer in charge of the police station. After hearing the applicant personally or by his Attorney-at-Law, and the officer-in charge of police station, if he is present, order is given on the application after giving reasons for that.

In the case of *Gunasekara V Ravi Karunanayake*¹⁴ the concept of Anticipatory bail was examined carefully by the Court of Appeal. The two main

¹⁴(2005) 2 Sri LR pg 180,

questions that arose in this case is whether suspect who is facing charges under the Public Property Act is entitled to make an anticipatory bail application and whether the provisions of Section 3 of the Bail Act has ousted the offences against Public Property Act, from application of the provisions of the Bail Act. By considering the intentions of the parliament through the Hansard, the Magistrate Court granted bail. However, this is considered to be a landmark judgment as it not only cleared the doubts regarding the Bail Act, but has also widened up the scope of the Bail Act.

When considering the Antiquities Ordinance which is amended by the Act No.24 of 1998 there is no any provision which empowers a specific Court to grant bail. This is a unique situation as in all the other statutes there are express provisions to release a person on bail. In the case of *Pannipitiya V Attorney General*¹⁵ three accused were taken into the custody on an allegation that they have committed offences under the Antiquities Ordinance. They made a bail application under Section

7 of the Bail Act. It was held that the Section 15(C) of the Antiquities Ordinance makes express provisions in respect of the release on bail of persons charged with or accused of offences under the said ordinance. The person charged with or accused of offences under the Antiquities Ordinance are covered under the 3rd category in Section 3 of the Bail Act do not therefore apply to a person charged with or accused of offences under the Antiquities Ordinance.

Conclusion

This Act addresses a very serious problem which has gone unaddressed for a very long period of time. The guiding principle in the implementation of the provisions of this Act shall be that the grant of bail shall be regarded as a rule and the refusal to grant bail as the exception. The rule, therefore upholds the values anchored in human freedom. The exception is refusal of bail, and it is only in special circumstances that the bail should be refuse. The decision of granting bail is the most crucial decision

¹⁵ 2011SLR1V267

from the point of view of the suspect or accused and also from the point of view of the liberty of the individual and by the provisions of this Act and recent

development of it through case law it promotes and correct bail decisions, thereby reducing the sufferings of the people and upholding the human liberty.