IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for the exercise of Revisionary Jurisdiction in terms of Article 138 of the Constitution read together with the High Court of the Provinces (Special Provisions) Act, No 19 of 1990 (as amended)

Hon. Attorney General
Attorney General's Department,
Colombo 12

Complainant

Vs.

Court of Appeal Application
No: **CA/ PHC/APN/10/22**

Hight Court of Puttalam
No: **HC/78/2021**

1. Hejaaz Omer Hizbullah
2. Saleem Khan Mohomed Shakeel

Accused

And now between

Hejaaz Omer Hizbullah
62, Subasadhaka Mawatha,
Hokandara South

Presently being held at New Magazine Prison, Welikada

Accused-Petitioner

Vs.

Hon. Attorney General
Attorney General's Department,
Colombo 12

Complainant-Respondent

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Romesh de Silva PC with Niran Anktel for the Petitioner Rohantha Abeysuriya PC Additional Solicitor General with Lakmini Girihagama SC for the respondent.
Supported on	:	02.02.2022
Decided on	:	07.02.2022

Iddawala – J

This is a revision application filed on 31.01.2022 by the 1st accused petitioner (hereinafter referred to as the petitioner) in the High Court of Puttalam Case No HC 78/2021. Petitioner impugns the Order dated 28.01.2022 of the same court, which refused to enlarge the petitioner on bail. Aggrieved by the said decision, the petitioner has invoked the jurisdiction of this Court to grant bail and/or release the petitioner from custody subject to any conditions as deemed appropriate by Court of Appeal.

Both parties were represented when the application was supported on 02.02.2022.

The President's Counsel for the petitioner made a comprehensive submission on the application of Section 15 of the Prevention of Terrorism Act (hereinafter referred to as the PTA), contending that the word 'shall' appearing in the Section must be construed as 'directive' rather than 'mandatory'. Parallels were drawn to Fundamental Rights jurisdiction ('shall' used in Article 126(5) is only 'directive'

and is not/cannot be 'mandatory'). Case law under the Immigrants and Emigrants Act (Thilanga Sumathipala v Inspector General of Police and Others (2004) 1 SLR 210 and Sumanadasa and 205 Others v Attorney General (2006) 3 SLR 202) were also referred to, thereby submitting that the judicial interpretation of the word 'shall' is meant to be 'directive'. In doing so, the learned President's Counsel submitted that the High Court has jurisdiction to grant bail under the PTA and that in any event, by virtue of Articles 138 and 145 of the Constitution and inherent powers, the Court of Appeal is empowered to release the petitioner on bail. It was further contended that as the Attorney General has consented to the petitioner's release on bail, the petitioner need not establish any other grounds in his application.

The Additional Solicitor General (ASG) appearing on behalf of the respondent (the Attorney General) consented to the application, reiterating a previous undertaking by the respondent to the same effect. The learned ASG referred to Section 404 of the Code of Criminal Procedure Act (hereinafter referred to as the CPC) as empowering the Court of Appeal to grant bail to the petitioner. The power given to the Court of Appeal by Section 404 of the CPC is an appellate power. As enunciated by well-settled law, a prerequisite for applying Section 404 of the CPC is the existence of an order of an original court (Rev Singarayar et al. Vs Attorney General Srikantha's Law Reports 11 page 154; Benwell vs The Attorney General 1988 1 SLR page 1). In the instant application, the learned High Court Judge has refused to grant bail to the petitioner, and such order was in force when the petitioner preferred this application. Thus, the circumstance of this application falls within the ambit of Section 404 of the CPC.

Having briefly set out the submissions by both parties, this Court will now provide the factual background of the instant application.

The petitioner was arrested on 14.04.2020. An indictment against the petitioner and the 2nd accused was forwarded by the Attorney General's Department on 12.03.2021, charging both under Section 2(1)(h) of the PTA and Section 3(1) of the International Covenant on Civil and Political Rights Act (hereinafter referred to as the ICCPR). The said indictment was served on the petitioner on 15.07.2021.

On 08.10.2021 counsel for the petitioner and the 2nd accused made an application for bail which the High Court of Puttalam refused by order dated 19.11.2021. Against such an order, the petitioner filed revision application CA/PHC/APN 128/2021. When the matter was taken up for inquiry on 21.01.2022, the Deputy Solicitor General appearing for the respondent made an undertaking that the Attorney General would consent to an application for bail if such application was made in the High Court after day's proceedings on 28.01.2022. On the said date, the learned High Court Judge delivered an order refusing to enlarge the petitioner and 2nd accused on bail by relying on the precedent set by Nithyanathan and Others v Attorney General 1983 2 SLR 251. However, the facts and circumstances of the above case and the present application are not similar. Aggrieved by the said order, the present application has been preferred.

Hence, the primary contention to be dealt with by this Court is whether the petitioner could be enlarged on bail.

The Constitution of Sri Lanka has endowed wide powers of revision to the Court of Appeal. Article 145 is an explicit recognition of such power which provides that the:

> *"The Court of Appeal may, ex mero motu or on any application made, call for, inspect and examine any record of any Court of Frist Instance and in the exercise of its revisionary powers may make any order thereon as the interests of justice may require."*

As such, it is pertinent to examine whether the circumstance of the present application falls within the ambit of 'interest of justice'. In evaluating the same, three unique circumstances of the present case may be referred to:

1. The petitioner has been incarcerated for close to 2 years. The charges levelled against him, if proven beyond a reasonable doubt, would sentence the petitioner to a period of 5 years in the minimum to 10 years maximum, rigorous imprisonment.

2. The Attorney General has consented to the petitioner being released on bail by virtue of an unequivocal undertaking.

3. No legal provisions are enabling the trial court to grant bail to the petitioner.

In addition to these specific factual circumstances of the instant case, it is pertinent to evaluate whether the Court of Appeal, in exercising its revisionary powers, can consider a bail application when an applicant has been charged under the PTA.

The PTA is the result of a Bill titled "An Act to make temporary provisions for the prevention of acts of terrorism in Sri Lanka, the prevention of unlawful activities of any individual, group of individuals, association, organization or body of persons within Sri Lanka or outside Sri Lanka and for matters connected therewith or incidental thereto" which was referred to the Supreme Court by His Excellency the President in terms of Article 122 (1) (b) of the Constitution (as an Urgent Bill). The Supreme Court, in examining the same, observed that the only question which it must decide is whether such Bill requires approval by the People at a Referendum by virtue of the provisions of Article 83 or whether it must comply with paragraph (1) and (2) of Article 82 of the Constitution. (SD No 7 of 1979 P/Parl/13 pronounced on 17.07.1979). In presenting the Bill to Parliament, reference was made to similar legislations from comparative jurisdictions such as Prevention of Terrorism Act No 76 of the United Kingdom and Australian Crime and Inter-National Protected Persons Act of 1976. A careful reading of the corresponding Hansard (in 1979 Volume 5 Columns 1428- 1596) clearly sets out the 'temporary' nature of the statute highlighting in specificity the contextualised enactment of the same. Reference was made to 'terrorism' in the context of separatist ideology perpetuated by the objective to 'establish Eelam' and delineate the intention of passing the legislation to 'completely wipe out' terrorism. The Preamble of the Act, *inter alia,* states the following:

> "…….*AND WHEREAS public order in Sri Lanka continues to be endangered by elements or groups of persons or associations that advocate*

the use of force or the commission of crime as means of, or as an aid in, accomplishing governmental change within Sri Lanka, and who have resorted to acts of murder and threats of murder of members of Parliament and of local authorities, police officers, and witnesses to such acts and other law abiding and innocent citizens, as well as commission of other acts of terrorism such as armed robbery, damage to State property and other acts involving actual or threatened, coercion, intimidation and violence;……"

Since then, four decades have passed, and the PTA has strayed far away from its historical context. The PTA, if in its application and implementation, creates a vicious cycle of abuse, the very purpose of the statute will be defeated. The Preamble of the Act refers to the affirmation that *"……. **men and institutions remain free only when freedom is founded upon respect for the Rule of Law and that grievances should be redressed by constitutional methods……."*** (Emphasis added). However, it is alleged that the PTA has been utilised at times to the detriment of personal liberty by its draconian implementation.

In such a context, even the Executive branch of the Government is considering the amendment of the PTA (The Gazette of the Democratic Socialist of Sri Lanka Part II of January 21,2022; Issued on 27.01.2022 and published by the Minister of Foreign Affairs), expressing a willingness to balance the need to eradicate terrorism against personal liberty as enshrined in the Fundamental Rights Chapter of the Constitution.

Ultimately, it is up to the Legislature to ensure that the draconian elements of the law combating terrorism are dispensed with per modern day contexts. Until such time, it is the judiciary's duty to employ existing legal provisions and constitutional powers to interpret the same elements in the interests of justice. His Lordship Justice Sripavan (as he was then) in Thilanga Sumathipala V AG (Supra) held that *"where the statute fails to provide a solution or offers a solution that is inconsistent with the basis of natural justice provisions of the Constitution the court is forced to frame a new precedent that will not exhibit these defects".* As observed above, the Court of Appeal is empowered to fulfil just that in exercising its revisionary jurisdiction under Article 145 of the Constitution.

As such, Section 15(2) of the PTA which provides that *"upon the indictment being received in the High Court against any person in respect of any offence under this Act or any offence to which the provisions of section 23 shall apply, the court shall, in every case, order the remand of such person until the conclusion of the trial"* should be construed in a manner that the powers vested with the Court of Appeal is not abrogated. This is in line with the sovereignty of people as enshrined in Article 4 of the Constitution which provides that the judicial power of the people is exercised *vis-à-vis* the Court. Any attempt to abrogate the powers delineated by the Constitution itself would be tantamount to an interference with the sovereignty of the people.

As such, it is the considered view of this Court that the revisionary powers vested with the Court of Appeal allows the same to consider the grant/refusal of bail for suspects/accused under the PTA.

Having thus examined the jurisdiction vested with this Court to evaluate the present application, the case's specific circumstances as elicited above must be considered.

The primary factor to be considered is the consent given by the Attorney General to release the petitioner on bail. Though inapplicable to the instant application, Proviso to Section 7(1) of the PTA recognises the manner in which the discretion of the Attorney General is given due credit within the scheme of the statute. As decided by a plethora of cases, the discretion of the Attorney General, borne out of careful evaluation, holds credibility and acceptance. Though fettered and liable for challenge, the discretion of the Attorney General in deciding the manner in which suspects/accused are dealt with during the course of a trial cannot be lightly regarded. In the instant application, the Attorney General has consented to the petitioner to be released on bail.

Coupled with the same, the period of incarceration in view of the sentence that may be imposed on the petitioner if convicted, and the legal impediment preventing the petitioner from seeking bail from the trial court, it is the considered view of this Court that the circumstance of the instant application

warrants the intervention of the Court of Appeal in the interests of justice.

This Court directs 1st accused petitioner, namely Hejaaz Omer Hizbullah, to be released on bail subject to the bail conditions as will be set out henceforth. It is further impressed that in the event any one or more of the bail conditions are violated by the petitioner, the trial judge is not restricted to exercise relevant statutory powers.

Application allowed.

Bail conditions

1. Cash Bail of Rs 100,000/-.
2. Two sureties acceptable to learned High Court Judge, to the value of 500,000/- each.
3. Petitioner to report to the DIG/SSP of Puttalam Police Division every 2nd and 4th Sunday of every month between 9.00am – 3.00 pm.
4. Passport to be surrendered to the High Court of Puttalam if it has not been done so.
5. Permanent residential address to be submitted to the Registrar of the High Court of Puttalam certified by the relevant Grama Sevaka.
6. The petitioner is severely warned not to interfere with the witnesses under any circumstance

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL