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

CA(PHC)APN No: 134/12

Hc Tangalle Case No. HCT 59/2006

Hon. Attorney General,
Attorney General Department,
Colombo 12.
Vs.
1.Thanthirige Nishantha Rohitha Jayalat
2. Chandradasa Kodikara
3. Koongala Unangalage Jayantha
4. Sudarshana Geeganage Amarasiri

Accused.

1. Jayawickrama Subasinghe Arachchilage Ariyapala,
2.Kaluarachchige Chandrasoma.

Sureties of the 4th Accused.

Jayawickrama Subasinghe
Arachchige Ariyapala,
"Ayesh Nivasa", Pahalaobada,
Walasmulla.
(presently at the Tangalle Prison)

Surety-Petitioner.

BEFORE : A W A Salam, J & Deepali Wijesundare, J.
COUNSEL : Asthika Devendra for the Petitioner.
Anoopa de Silva S.C. for the Respondent.
DECIDED ON : 06.11.2012.

A W A Salam, J

The petitioner's grievance in this revision application is that he has been imprisoned by the learned High Court Judge otherwise than by adhering to the due process of law. He asserts that he is entitled to be freed on that account. The Learned State Counsel, in the highest tradition of the Department to which she is attached, filed no objection nor resisted the application. She conceded that the impugned order is fatally irregular implying that it had occasioned a failure of justice. The candid opinion of the State Counsel would undoubtedly serve the ends of justice. Nevertheless, in the hope of achieving completeness, I wish to analyse the entire order of the High Court Judge.

The factual background which led to the filing of the revision application needs to be narrated filtering out unnecessary details. The petitioner stood surety for an accused before the High Court. As the accused failed to attend Court, he was arrested and produced in Court on 26.03.2012 and thereafter released to enable him to produce the accused on 23.04.2012. In obedience to the order of Court, on 23.04.2012, he produced the accused through an attorney-at- law. At this stage the High Court Judge remarked that the suspect deserved to be re-remanded as he is a person of violent behaviour and persistently reoffended using two T 56 guns while on bail.

Surprisingly, no steps were taken to cancel his bail. For this course of action adopted, the High Court Judge voiced the opinion that the suspect will bear a grudge against the society if he is committed to the remand custody. He further stated that it is undesirable to put him back into the remand custody as he

will be a threat to the welfare of the inmates therein. Elaborating on it he recalled (without disclosing the source of information) that the accused gave leadership, when riots broke out inside the prison on 30.06.2011. Based on these grounds he thought that it is not prudent to have him re-remanded. This obviously has given a wrong message to the accused that his intolerable behaviour has compelled the Judge to tolerate him without a cancellation of bail. In this respect suffice it would be to say that the remedy found by court was worse than the decease.

Despite the fact that he opted not to cancel the bail, yet he proceeded to make a controversial order, directing the accused to observe "*ata sil" (eight precepts)* at a named temple on all four Poya days of the month and to surrender the two T56 Type firearms to Court on 30.04.2012. The directions thus made were not part and parcel of the bail conditions.

On 30.04.2012 the suspect avoided Court and the petitioner who presented himself was sentenced to 3 years rigorous imprisonment for non-payment of the value of the bond. When the application for revision came up for support, we issued a stay order and the petitioner was released from the prison having served a jail term of 5 months.

Several questions arise as to the legality of the various orders made by the High Court Judge. The first and foremost is whether the bail bond could have been regarded as being forfeited. The word "forfeited" means that a condition or more imposed upon the executant of the bond and agreed to by him has been contravened. (vide Tarni Yadav Vs State (1962) Cr LJ 627- AIR 1962 Pat 431.

Admittedly, the petitioner was produced on 26.03.2012 and he

was granted time till 23.04.2012 to produce the suspect. Accordingly, the petitioner in obedience to the order of Court produced the suspect on that day although the High Court Judge failed to cancel his bail despite his serious comment made against the accused. The purpose of refusing bail *inter alia* is to protect the community and to reduce the likelihood of further offending. Further the petitioner's Counsel contended that it is this controversial order which kept the accused away from Court.

The concept of bail is the recognition of the liberty of a person between the time of his arrest and verdict subject to the condition that he re-appears in Court for his trial until its conclusion or until he is sentenced. The Court is entitled to cancel a bail bond (after hearing the accused) for violating the bail conditions and it includes specific grounds such as having threatened or influenced or tampered with evidence or interfered with the investigation or obstructed the judicial process or otherwise misused or abused the grant of bail. The conduct of the accused in this matter, as described by the learned High Court Judge falls within the disqualifications to be on bail and it is surprising as to how the Court made up its mind to condone such disqualifications.

It is appropriate at this stage to examine as to whether the surety bond entered into by the petitioner can be regarded as having been forfeited. The petitioner was directed to produce the accused on a particular day. In obedience to the said direction he produced him. Yet, the Court took the risk of enlarging him on the same bail notwithstanding the strong opinion it held to the contrary. Further the court made an order directing the accused to hand over the T 56 firearms on the next date. This was done by the learned High Court Judge (assuming without conceding that he had the right to do so) without even inquiring from the

accused as to whether he was in possession of such firearms. The accused kept away from attending court on the day he was expected to handover the two firearms. In the light of these facts, it is quite clear that the court has condoned the default of the petitioner-surety (if any) when the court gave him time to produce the accused and when the surety in fact did produce him on 23rd April 2012. If the surety bond was forfeited on 26 March 2012 the petitioner may have had no defence. The learned High Court Judge has forfeited the bond after the surety had produced the accused and undue leniency shown to the accused by court with full knowledge of his involvements. In the circumstances, it is totally unfair to treat the surety bond as having been forfeited.

Inspector of Police Vs Punchibanda Ceylon Law Weekly volume 2 page 136 has been decided on similar facts. The accused for whom surety bond was signed in that case failed to attend court and the surety appeared on notice and obtained extended time to produce the accused. On that day the surety was present and the accused surrendered to court. The accused pleaded guilty and was given a week's time to pay his fine. Thereafter, the Magistrate called upon the surety to show cause why his bond should not be forfeited. The surety stated that he had no cause to show and the Magistrate forfeited the bond. Macdonald CJ held that if the Magistrate had forfeited the bond on the first day when the accused was not present the surety may not have had a defence. But the surety was given time till 12th and on that day the accused surrendered. Giving the surety time to produce the accused seems a condonation of the surety's previous default. After time had been given the surety did produce the accused on the due date and to declare his bond forfeited then is rather like punishing him for the previous default which had been condoned.

In support of the above decision, Macdonald CJ cited with

approval the note of an American decision cited in Sohoni's "The Code of Criminal Procedure" – 10th edition- page 1245. The note reads as follows...

"The judgement against surety and principal respectively on a forfeited recognizance will be cancelled on motion where it appears that subsequent to the forfeiture the accused person had appeared, was tried, paid the fine imposed." People Vs Bossemeeker 27 weekly digest 387.

Taking into consideration the sequence of events taken place in the present case, it could be seen that the facts in the case of Inspector of Police Vs Punchibanda and the present case are almost similar. In the present case, the sureties were arrested and produced before the learned High Court Judge who granted time without forfeiting the bond. On the next date the accused surrendered and the learned High Court Judge released him on the same bail conditions. This clearly indicates the exoneration of the sureties or condonation of their default (if any). The order made by the learned High Court Judge on the accused to surrender the firearms and to engage in certain religious observances are not part and parcel of the bail bond and therefore the sureties were not bound by the said order. Besides, the said order has been made in blatant violation of the rights of the accused and therefore cannot have any force or avail in law.

Undoubtedly, the application of the concept pertaining to the grant of bail, cancellation, forfeiture etc, requires a greater command of the legal principles. It is an established principle of law that the grant of bail or refusal is a judicial discretion and not a mere discretion. (Emphasis is mine). An important decision on the exercise of discretion is worth being referred to at this stage. In the case of Roberts vs.

Hopwood and others1925 AC page 578 at page 613 Lord Wrenbury (House of Lords) voiced his opinion as to the manner in which a judicial discretion should be exercised, in the following words.

> "The person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so-he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the cause which reasons direct. He must act reasonably."

As far as the surety is concerned, he must really be admired for the way he has conducted himself in difficult circumstances particularly when he has undertaken to produce a suspect of the character as portrayed by the High Court Judge. A surety undertakes to forfeit a sum of money if the accused fails to adhere to the conditions of bail. This system has been tested time and again in one form or another. When members of the community who do know the accused volunteer to stand surety, they ensure their attendance to stand their trial because they trust them and thus shoulder that burden on that trust. This can have a powerful influence on the decision of the court as to whether or not to grant bail. This system, in one form or another, has priceless antiquity and is immensely valuable.

The benefits of taking surety bail are twofold. Firstly the surety is bound to exercise some form of supervision on the accused, and report to court if there is a concern that he will abscond. On the other hand it is designed in such a way so as to discourage the accused from jumping bail as the member/members of his family and/or friend/friends who provided the sureties will be driven into unnecessary embarrassment. In our

experience, it is comparatively rare for an accused to keep away from court when meaningful sureties are in place. This is the advantage of bringing in family members or close friends into the scene than to simply depend on Government Servants as sureties which may appear to be a meaningless exercise that was not heard of in the past. As the surety stands as a bridge between the accused and court, the surety should not be put into unnecessary inconvenience or embarrassment otherwise than by resorting to the due process of law.

The complaint of the petitioner demonstrates in no uncertain manner, a display of judicial ignorance in the quality of justice meted out both to the petitioner and the accused. Regrettably, the surety had already served a term of imprisonment of 5 months when we issued the stay order. In passing, I must observe that had the petitioner been sentenced to the maximum period of six months he would have come out of the prison long before he filed this application. The fact remains that he was nevertheless a prisoner and goes back to society with the social stigma attached to it. Even after his exoneration the stigma is bound to remain. Although I have considerable sympathy for him, it is rather unfortunate that the immunity attached to the impugned order, stands in his way, to claim damages from anyone. Such a far reaching consequence demands a correspondingly high duty of care and caution to ensure that the proper procedure is followed before an executant of a bond is sentenced to a default term. It is the right of the subjects to insist that the law is followed as it is with regard to their liberty, particularly on the question of bail. No Judge is empowered to apply the law at his whims and fancy.

Therefore, I approach this issue on the basis that the High Court should not have forfeited anything more than what the law

permitted it to forfeit. It is the duty of Court, to maintain the integrity and confidence of the system of taking sureties, as it is of considerable importance to encourage law-abiding persons to come forward to assist the release of suspects on bail, since the grant of bail is regarded as the rule and refusal an exception.

The learned High Court Judge had no authority to order the accused to surrender the firearms. Adding insult to injury he has made the said order against the accused who faced his trial, to surrender the firearms, based on personal information he had received or on his personal knowledge.

In ordering the accused to make the religious observances on a weekly basis, the High Court Judge has assumed that the accused is guilty of the charges at a pre-mature stage of the case. What is important here is that he has no authority to order him to observe Sil even if the accused was convicted. Quite significantly, if the controversial order containing the two directions had not been made, as contended by his Counsel, the 4th accused probably would not have avoided court.

No court has jurisdiction or authority to pass an order of cancellation of a bail bond or to declare a bond as forfeited, otherwise than in accordance with the statutory provisions. It is settled law that a surety bond has to be strictly construed because the violation of it's terms provides for interference with the personal liberty and/or deprivation of property rights. Since the bond entered into by the surety contains no provision to ensure the handing over of the firearms or making religious observances by the accused, the surety cannot be held liable to account for the violation of the said directions.

The law on this aspect is well settled. Before a decision is taken

to forfeit a bail bond a hearing should be given to the surety and this rule was the demand of the rules of natural justice which has now become a statutory requirement. Not affording such an opportunity to a surety would be a gross violation of the principles of natural justice and the express provisions of the Code of Criminal Procedure. Such an order of forfeiture would be liable to be quashed on account of such violation.

The Criminal Procedure Code provides specific provisions in respect of bonds. Section 422 relates to the procedure as to forfeiture of a bond. It reads as follows...

422. (1) Whenever it is proved to the satisfaction of the court by which a bond under this Code has been taken, or when the bond is for appearance before a court to the satisfaction of such court that such bond has been forfeited, the court shall record the grounds of such proof and may call upon any person bound by such bond, to pay the penalty thereof or to, show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid the court may proceed to recover the same by issuing a warrant for the attachment and sale of the movable or immovable property belonging to such person.

(3) Such warrant may be executed within the local limits of the jurisdiction of the court which issued it and it shall authorize the distress and sale of any movable or immovable property belonging to such person without such limits when endorsed by the Judge within the local limits of whose jurisdiction such properly is found.

(4) If such penalty be not paid and cannot be recovered by such

attachment and sale the person so bound shall be liable by order of the court which issued the warrant to simple imprisonment for a term which may extend to six months.

(5) The court may at its discretion remit any portion of the penalty mentioned and enforce payment in part only.

Accordingly, if an executant of the bail bond, instead of paying the value of the bond or part thereof as the case may be, elects to show cause why the penalty should not be paid the court must consider the cause shown, and make an appropriate order.

If the court decides that the cause shown is acceptable or sufficient, the only order which the court can pass is that the payment of the penalty on the bond does not arise.

Conversely, if the court comes to the conclusion that the cause shown is unacceptable or insufficient, the court may then proceed to recover the same by issuing a warrant for the attachment and sale of the movable or immovable property belonging to the executant for realisation.

The next stage arises only when such penalty is not paid and cannot be recovered by such attachment and sale. Then only the person so bound shall be liable by order of the court which issued the warrant to simple imprisonment for a term which may extend to six months.

When an executant of a bail bond is to be sentenced to imprisonment by any Court the maximum period of imprisonment permitted is 6 months of simple description. I am unable to understand the basis on which the learned High Court Judge has imposed a jail term of 3 years of rigorous

imprisonment.

Taking all these matters into consideration, it is quite clear that the forfeiture of the bond has been done without any proof of the contravention of the bail bond. It has been done as stated above after the default of the executant had been condoned.

Even if the forfeiture is lawful, yet the petitioner has not been afforded an opportunity to show cause as to why the fine should not be paid. Even if that opportunity had been afforded still no warrant for the attachment and sale of the movable or immovable property belonging to the executant has been issued.

In the circumstances, I am of the opinion that the order of the learned High Court Judge forfeiting the bond should be quashed and the default sentence passed on the surety set aside.

Accordingly, the order relating to the forfeiture of the bond and the default sentence passed on the surety are hereby set aside.

A.W.A.Salam,J

Judge of the Court of Appeal

I agree.

Deepali Wijesundera,J

Judge of the Court of Appeal

NR/-