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

In the matter of an appeal to the COURT OF APPEAL from the Judgement of the High Court of the Western Province holden in Colombo

The Attorney General
Attorney General's Department,
Colombo 12

Applicant

Vs.

Court of Appeal Application No :
EXT/0001/19

High Court of Colombo No :
HC 47/17

Pragasini Manju Tharmasuthan
37, Mary's Road,
Bambalapitiya.

Respondent

And now between

Pragasini Manju Tharmasuthan
37, Mary's Road,
Bambalapitiya.

Respondent - Appellant

Vs.

The Attorney General
Attorney General's Department,
Colombo 12

Applicant-Respondent

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Shanaka Ranasinghe PC with Niroshan Mihindu Kulasuriya and Ms. Tharakee Manchanayak for petitioner
		Sudharshana De Silva DSG for AG
Argued on	:	08.12.2021
Decided on	:	25.01.2022

Iddawala – J

This is an Appeal filed on 06.09.2019 against an order of the High Court of Colombo dated 23.08.2019 which overruled a preliminary objection raised by the respondent appellant in case HC 47/17. The appeal involves an application made by the Attorney General (applicant-respondent and hereinafter referred to as the respondent) under section 9 of the Extradition Law No. 8 of 1977 as amended by No. 48 of 1999 (hereinafter referred to as the Act).

The impugned order refers to an objection raised by the respondent appellant (hereinafter referred to as the appellant) on a procedural irregularity in the request made by the respondent which was rejected by the High Court in its order dated 23.04.2019. The objection alleged that the respondent did not comply with Australian criminal procedure law and thereby violated section 8(3) of the Act.

The Background

The factual background of the appeal is as follows. The Attorney General of the Commonwealth of Australia made an extradition request for the appellant to the respondent on 01.08.2016 where the Australian authorities have informed the respondent that the appellant has been criminally charged for committing an offence(s)

during the time the appellant was employed in the Postal Department of Victoria, Australia. Case briefs containing the evidence collected during the investigation in Australia has been shared with the respondent. As such, it has been revealed that the appellant has allegedly committed criminal misappropriation of $ 757,309.25 Australian Dollars thereby dishonestly causing a loss to the Australian Post. As such, the appellant has been charged under Case No.2383/09 before the County Court of Victoria, Australia where she has been charged with a total of 228 charges for *inter alia* defrauding a public authority. While the case was pending before the County Court of Victoria, Australia, the appellant has returned to Sri Lanka. The Australian Authorities have made a request under the Act to extradite the appellant from her current residency in Sri Lanka to Australia to face the charges levelled against her. After investigations conducted by Sri Lankan authorities, it has been revealed that the appellant is currently residing in No. 37, Mary's Road, Bambalapitiya.

Thereafter, as per section 8(3) of the Act, an Authority to Proceed was issued by the Minister of Defence against the appellant after which, the respondent has made an application to the High Court of Colombo requesting the appellant be arrested for committal. On 09.03.2017 the High Court issued a warrant, and the appellant was arrested and produced before court and subsequently enlarged on bail on 30.03.2017. At the stage of inquiry, the following preliminary objections were raised by the appellant.

a. Respondent failed to comply with sec 8(2)(a) requirements of the Act as the Minster has not applied his mind to the material when exercising his discretion.

b. Purported warrant of arrest submitted under the above section does not comply with the statutory requirements of Australian Criminal Procedure Act

c. Double jeopardy

Written submissions were made by both parties on the said objections and on 23.08.2019 the High Court delivered the impugned order. As such, the order refers to the Authority to Proceed issued by the Minister of Defence stating that the discretion of the Minister under section 8 of the Act cannot be challenged before the High Court. It further determined that the role of the High Court is confined to an inquiry of whether the alleged offence committed by the appellant in Australia is an 'extraditable offence'

as per the meaning of the Act, and whether there's sufficient evidence that satisfies the issuance of a warrant, if such offence was committed in Sri Lanka. In its essence, the order has examined whether the appellant can be committed under section 10(4) of the Act which states that "*where an authority to proceed has been issued…after hearing evidence, Court shall, unless committal is prohibited by any other provisions of this law, commit him to custody to await his extradition thereunder, but if the court is not satisfied, or if the committal of the person is prohibited, the court shall discharge him from custody"*

Against such order, the present appeal was filed on 06.09.2019, impugning the dismissal of the preliminary objection by the High Court in its order dated 23.08.2019. The appeal contends that the said order:

1. Failed to appreciate the insufficiency of evidence presented by the respondent for the issuance of an Authority to Proceed
2. Failed to consider whether respondent complied with established procedure of Australia regarding issuance of warrant.
3. Misdirected itself when it held that the High Court cannot challenge the discretion of Minister.
4. Failed to appreciate double jeopardy (accused has been subjected to sever pecuniary penalty).

The Arguments

On 08.12.2021, the Appeal was taken up for argument. On behalf of the appellant, submissions were made on the question of legality of the warrant and whether the burden imposed by the Act on the respondent has been sufficiently dispensed with in view of section 59 and section 104 of the Evidence Ordinance. Reference was made to the law governing a valid warrant of arrest in Sri Lanka and Australia, contending that the warrant produced in the present case complied with neither. Further, the President's Counsel for the appellant argued that the Minister for Defence has failed to apply his conscious mind when issuing the Authority to Proceed thereby vitiating the very basis of the proceedings initiated against his client before the High Court. It was contended that the Minister has mechanically placed his signature. The President's Counsel also

made submissions on the claim that the initiation of proceedings against the appellant amounts to double jeopardy as $ 30,000 Australian Dollars have already been recovered from the appellant. It was his contention that moving for extradition amounts to double jeopardy in a context where a penalty has already been imposed on the appellant. In concluding, the President's Counsel for the appellant stated that the offence was allegedly committed in 2006 and the purported warrant was only issued in 2009 which pointed to an irregularity in the procedure adopted by the Australian Authorities and contended whether a citizen of Sri Lanka should be handed over to a foreign nation under such irregular circumstances.

On behalf of the respondent, the Deputy Solicitor General (DSG) argued that the impugned order cannot be challenged by way of an appeal as it is not in the nature of a final order, asserting that a right of appeal has not been conferred against the order dated 23.08.2019. Elaborating on the same it was contended that the inquiry is still pending before the High Court yet to be concluded and as such the impugned order does not fall within the definition of a 'final order'. It was submitted that the appellant has filed a revision application against the same impugned order and such application has been duly dismissed by the Court of Appeal, against which the appellant has proceeded to the Supreme Court. To buttress this argument several case law precedents were referred to by the DSG. It was the contention of the DSG that the appellant is necessarily inviting the Court of Appeal to pass judgment on the merit of the case when the same is *pending* before the High Court and that all facts and circumstances related to the legality or otherwise of the warrant, issue of double jeopardy will have to be determined at the said inquiry. It was further submitted that the appellant has not exhausted alternate remedies such as the writ jurisdiction to impugn the decision of the Minister to issue an Authority to Proceed against the appellant.

Having thus set out the factual background which transpired before court in terms of submissions from both parties, this Court will firstly examine the legal provisions pertinent to the instant matter.

The Law

At the outset the origin and application of the principles surrounding extradition can be examined. Accordingly, the Attorney General v Ruberoe and Others (1988) 1 SLR 323 extensively examined the legislative history of the law on extradition in Sri Lanka:

> *"The Extradition Acts of 1870 and 1873 of the United Kingdom were imported into the local law by the Extradition Ordinance No. 10 of 1877 and by the proclamation of the Governor of Ceylon dated April 03, 1878, the Order-in-Council passed by Her Majesty in Council on February 04, 1878 and published in the Ceylon Government Gazette of April 12, 1878."*

In Philip Gordon James Benwell v The Attorney General (1986) 1 SLR 30 His Lordship Justice Atukorale has made the following observations:

> *Our extradition law provides for the extradition of fugitives to and from designated Commonwealth countries and foreign States (called treaty States). Proceedings in extradition are founded on international obligations arising out of mutual agreement between different countries. These obligations involve a very high sense of responsibility and commitment on the part of such countries. Extradition law is designed to prevent a fugitive who has committed a crime in one country from seeking asylum in another to which he has fled to avoid trial and punishment. It rests upon the plainest principles of justice. It is a law which is of vital importance to the public administration of criminal justice as well as to the security of different countries.*

As such, the Extradition Law as applicable in Sri Lanka provides for the processes by which a person may be extradited to a foreign country after such person has been committed to custody. After a foreign nation makes an extradition request, the procedure is set in motion by the provisions of section 8(3) of the Act which delineates the issuance of an Authority to Proceed to a Court of Committal. In Philip Gordon James Benwell (supra) the court held that "*Moreover it is not the requisition of the Foreign Minister but the authority to proceed issued by the appropriate Minister of this country which empowers the Court of Committal to commence proceedings for the committal of the fugitive."*. Thereafter, under section 9 of the Act, on receipt of an authority to proceed

issued by the Minister acting under section 8, an arrest warrant will be issued by the Court of Committal and whereby such person will be arrested and produced before the respective court. After such person is produced before the Court of Committal, proceedings are held under section 10 of the Act, at the conclusion of which, the person may be committed to custody awaiting extradition or discharge. In Re Naresh Parsaram Butani (1991) 1 SLR 350 held that "*The Judge hearing the committal proceedings has to be satisfied in terms of section 10(4)(a) of the Extradition Law that the evidence is sufficient to warrant the trial of the person sought to be extradited if the offence had been committed within the jurisdiction of his Court."*

At this juncture, it is pertinent to refer to the following extract from Philip Gordon James Benwell (supra) as well. The case dealt with whether the Court of Appeal had the revisionary jurisdiction with regard to matters appertaining to extradition. The main substantive question that was raised and argued in the High Court inquiry under section 10 of the Act was whether certain pieces of evidence produced by the foreign state was duly authenticated as per the requitement of section 14(2) of Extradition Law No. 8 of 1977. In commenting on the High Court's recourse to the corresponding provisions on authentication of the Australian law of extradition, the Supreme Court held that *"I do not think it is permissible to have recourse to the corresponding provisions of the Australian law of extradition as was done by the learned High Court Judge. There is no justification for doing so. It is imperative that the court should have regard solely to the provisions of our law because what constitutes due authentication of a document is set out in the above subsection."*

Benwell v The Attorney General 1988 1 SLR 1 was a case concerning an application for bail under the Extradition Act, where Section 10 of the Act was dealt with and the Supreme Court, in examining the scope of jurisdiction of the court of committal under the said section, held that;

> "*The proceedings under the section terminate either in the discharge of the person from custody or in his committal to custody to await his extradition (section 10(4)) …With the order of the committal under sub-section 4 of that section the proceedings come to an end. The court has no further jurisdiction to make any order*

impinging on the order of committal to custody." Speaking of the final order delivered by the Court of Committal, Philip Gordon James Benwell (supra) held that section 10(4) of the Act *"stipulates, inter alia, that where an authority to proceed has been issued in respect of a person arrested and produced before the court of committal and the court is satisfied, after hearing evidence, that the offence to which the authority relates is an extraditable offence and it is further satisfied, in the case of a person accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if it had been committed within the jurisdiction of the court, then the court shall, unless his committal is prohibited by any other provisions of that law, commit him to custody to await his extradition thereunder, But if the court is not so satisfied or if the committal of the person is so prohibited, the court shall discharge him from custody. Whilst subsection (2) of s. 10 in effect confers in so far as proceedings under that section are concerned, the same jurisdiction and powers on a court of committal as if it were a court of trial, subsection (4) mandates the making of an order after hearing evidence either committing or discharging him."*

Section 11 of the Act provides for an application for a mandate in nature of a writ of habeas corpus against the order of the Court of Committal in the Court of Appeal. In the case of Re Naresh Parsaram Butani (supra), an application for a mandate in the nature of a writ of habeas corpus was made under section 11 of the Act read with Article 141 of the Constitution of the Democratic Socialist Republic of Sri Lanka. In such, the court examined the sufficiency of evidence placed before the Court of Committal after the inquiry was concluded, which determined that the standard of proof required for extradition is nothing less than a *prima facie* case, which in this instant, was fulfilled. In speaking the avenues of review available against an order of committal by the Court of Committal in an extradition application, the Court of Appeal pronounced the following:

"The Extradition Law provides for the review of the order of the committal on an application being made to the Court of Appeal for a mandate in the nature of a writ of habeas corpus ***rather than by way of a regular appeal****…Similarly it was*

observed in R v. Governor of Brixton Prison ex parte Schtraks …..at page 585 Viscout Radcliffe cited with approval the judgment of Lord Russel of Killowen C.J. in In re Galway "We should, after the order of committal, be entitled to review the Magistrate's decision, ***not in the sense of entertaining an appeal from it, but in the sense of determining whether there was evidence enough to give him jurisdiction to make the order of committal****".* (Emphasis added)

As such the legal framework surrounding the extradition of a person from Sri Lanka to a foreign country is initiated with a requisition made by the said foreign country to the relevant Sri Lankan authority as per the extradition arrangements between the two countries, in pursuance of which the relevant Minister in charge of the subject of extradition will then issue an Authority to Proceed to the Court of Committal in terms of section 8(3) which will in turn issue a warrant of arrest. After such person is arrested and produced, the court will commence proceedings under section 10 of the Act with a view to committing him to custody to await extradition or discharge. At such hearing, evidence will be led in support of the request for extradition and objections thereto may also be raised. Upon the Court of Committal being satisfied or otherwise of the sufficiency of evidence to establish a *prima facie* case for extradition, an order will be made under subsection (4) of section 10 of the Act. Against such order of the Court of Committal no right of appeal is conferred on an aggrieved party. In its place section 11 of the Act provides for an avenue of challenge by a way of an application for a mandate in the nature of a writ of habeas corpus, in the Court of Appeal.

Conclusion

As the facts revealed, the present application has been filed by the appellant prior to an order been issued by the High Court of Colombo, the Court of Committal in the instant matter. The inquiry as per section 10 of the Act is yet to be concluded and the High Court is yet to pass a final order determining whether the appellant should be committed or discharged. Section 10 has clearly and unequivocally provided for the procedure that ultimately culminates in a final order. The impugned order in the present application is not such a final order, rather it is in the nature of an interlocutory order against which

no right of appeal lies. Though the document marked in page 71-73 of the appeal brief reads as its title 'judgment' the impugned order is not a final order, but a mere dispensation of an objection raised by the appellant to the proceedings. The Learned High Court Judge in his "judgment" dated 23.08.2019 at page 3 held as follows*: 'Due to the above-mentioned reasons, preliminary objections raised by the Respondent are overruled. I order to proceed with the matter'.* In this regard reference can be made to SC Appeal No 41/2-15 and SC/CHC Appeal 37/2008 SC Minute dated 04.08.2017 which was heard before a bench comprising of 6 Justices presided over by His Lordship, Chief Justice Priyasath Dep PC. Both applications dealt with this judgment involved questions of law identical to each other where sections 754(1) and 754(2) of the Civil Procedure Code was discussed. Determining on the proper mechanism for filing an appeal, the said judgment upheld the finding that no right of appeal lies against an interlocutory order. In any event, there is no right of appeal specifically provided under the Extradition Law of Sri Lanka, but Section 11 of the Act provides for the review of the order of the committal in an instance where an application is being made to the Court of Appeal for a mandate in the nature of a writ of habeas corpus, as explained above.

With reference to the 'grounds' alleged by the appellant, it is the considered view of this Court that the same ought to be determined in the inquiry before the High Court and the present application amounts to a premature attempt by the appellant to challenge the final determination of the High Court. As such, the averments on double jeopardy and reference to procedural irregularities in the issuance of the warrant will not be determined by this Court.

Furthermore, this Court holds that the impugned order has rightly held that it has no jurisdiction to determine on the discretion exercised by the Minister in issuing the Authority to Proceed. As clearly set out in the applicable law, the scope of jurisdiction of the High Court in the instant matter is limited to examine whether an extraditable offence has been committed and whether or not the appellant should be committed to custody awaiting extradition. This inquiry is yet to be concluded by the High Court and we see no reason to interfere with the ongoing processes pending against the appellant in the High Court.

Prior to conclusion, this Court wishes to note and highlight the importance in expediting the inquiry against the appellant. The requisition has been made by the Attorney General of the Commonwealth of Australia in 2016 and the issue of whether the appellant should be extradited or not is yet to be concluded. In fact, the matter is pending without any development. As examined at the beginning, extradition involves international obligations based on principles of reciprocity and mutual benefit. It is a matter dealing with mutual legal assistance and as such it is the reciprocal duty of Sri Lanka authorities to assist the requesting nation with the utmost diligence thereby cementing goodwill. Any undue delay in such a matter cannot be condoned in any sense. This Court hereby orders the inquiry pending before the High Court of Colombo in case no. HC 47/17 be given priority and to be concluded expeditiously.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL