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

In the matter of an Application for Bail under and in terms of section 15 B of the Prevention of Terrorism (Temporary Provisions) Act of No. 48 of 1979 as amended by Act No. 12 of 2022.

M.J.F Sumaiya,
Attorney-at-Law,
Faris & Associates
No.120-1/1, Hulftsdorp Street,
Colombo - 12

Petitioner

On Behalf of,
Fazrul Rahuman Mohomed Zahran
No.19/1, Mattawa Road,
Warakamura, Matale.
(Presently under remand custody at the Boossa Prison)

Case No: **CA/BAL/81/2022**

Magistrate Court Colombo Fort
Case No: **No.B/13100/19**

Vs.

1. G.P.Y.S. Keerthisingha
Officer-In-Charge
Gang Robbery Investigation Branch
Criminal Investigation Department
York Street,
Colombo 01.

2. The Director
Criminal Investigation Department
York Street,
Colombo 01.

3. Inspector-General of Police
Police Headquarters,
Colombo 01.

4. Hon. The Attorney- General
Attorney-General's Department
Colombo 12.

Respondents

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Faris Saly with Senesh Dissanayake instructed by M.J.F. Sumaiya for the Petitioner Lakmini Girihagama Deputy Solicitor General for the 1-4th Respondents
Argued on	:	07.02.2023
Decided on	:	22.03.2023

Iddawala – J

This is an application for bail made by the petitioner appearing on behalf of the suspect (the Attorney-At-Law of the suspect) in terms of the Prevention of Terrorism (Temporary Provisions) Act, No. 49 of 1979 (*hereinafter the PTA*) as amended by the Prevention of Terrorism (Temporary Provisions) (Amendment) Act, No. 12 of 2022.

Background

The facts of the case are as following. The suspect, one Fazrul Rahumam Mohamed Zahran, was arrested by the Matale Police on the 24.04.2019 and produced before the Magistrate Court of Matale under the case bearing No – AR/493/19 due to a suspicion of the suspect's culpability, although the offence against the suspect was not determined at the time. He was subsequently released on the 08.05.2019 by the learned Magistrate as there were no sufficient material to keep the suspect detained. The suspect, at the time of arrest was 23 years old and was an employee of the Crown Construction Company in Qatar. He has returned to Sri Lanka on 15.04.2019 due to the inability to renew his Visa. The suspect was subsequently arrested by the CID under the PTA on 08.05.2019 along with his mobile phone with Subscriber Identity Module (SIM), hard

disk and computer accessories on the suspicion of the suspect having shared a video and information to Amaq News Agency via the internet which contained content related to the Easter bombing attack on the 21.04.2019.

Since then, the suspect has been incarcerated without an indictment being served against him. Further on the suspect was included as a designated person for conducting and funding terrorism activities by the Gazette Extraordinary No.2140/16 dated 09/09/2019 with para 3 & 7 of regulation 4 and Gazette Extraordinary No.2291/02 dated 01/08/2022 with regulation 4(7) of the United Nations Regulation No.1 of 2012 of the United Nations Act No.45 of 1968.

Being aggrieved by the said circumstances, the petitioner has filed the instant application under Section 15B of the PTA as amended by Act, No. 12 of 2022 (*hereinafter the PTA as amended*), praying for the suspect to be released on bail.

Arguments

In delving into the arguments made by the two parties, it is noted that the petitioner rejects the existence of a criminal intention behind the act of sharing a video and avers that the suspect has been held in incarceration for 3+ years (approximately 3 years and 10 months) without any indication of an indictment been served. The petitioner further states that the suspect has been in the state of Qatar when the Easter bombing attack transpired and the suspect was personally affected by the horror of it. Moreover, the petitioner states that alleged offence was bereft of criminal intention and was merely done out of curiosity on the part of the suspect. Petitioner further asserted that the offence of conducting and funding terrorism is unfounded and without cause as the suspect is not affluent enough to fund any activity given his state of unemployment. In line with the above arguments, the petitioner states that the prolonged period of incarceration has caused the suspect and his family to endure physical and mental agony and more importantly it has unjustifiably squandered the youthfulness of the suspect for a crime he did not intend or commit.

The respondent submitted that Amaq News Agency has connections to Islamic State of Iraq and Syria (ISIS) and that the suspect has shared a video with the intention of attracting others and raising funds for ISISI by posting the said video on Amaq News

Agency website. Therefore, the respondents purported the objection that the suspect intentionally corresponded with ISIS and that the suspect has shared the video while explicitly stating his intention to create a council called the "Shura Council" and to establish a new Muslim State called "Waliya". The respondents have stated the above objections in buttressing the culpability of the suspect in maintaining allegiance to ISIS and to thereby having committed an offence under the PTA.

Before indulging in an analysis of the said averments and the objections, this Court brings to light the significance of the present application as it is the first of its kind to be argued at length before the Court of Appeal under the PTA as amended with the introduction of the Prevention of Terrorism (Temporary Provisions) (Amendment) Act, No. 12 of 2022. Hence, this Court will take this opportunity to trace the legislative history of bail under the PTA to shed light in the manner in which Act, No. 12 of 2022 ought to be applied.

Legislative history of the PTA in respect of bail

The principal enactment of Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (*hereinafter the PTA*) stipulated the following in Section 15: "*Every person who commits an offence under this Act shall be triable without a preliminary inquiry, on an indictment before a Judge of the High Court sitting alone without a jury*". Section 15 was later renamed as Section 15(1) under the Amendment Act, No. 10 of 1982 and the legislature additionally included a subsection (2) as follows: "*Upon 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*". Additionally, Act, No. 10 of 1982 included a new Section to the principal enactment as 15A which dealt with the place of detention until conclusion of trial. Thereafter, the legislature amended Section 15(1) under Amendment Act, No. 22 of 1988 to recognize Trial-at-Bar under the Act: *"Every person who commits an offence under this Act shall be triable without a preliminary inquiry, on an indictment before the High Court sitting alone without a jury or before the High Court at Bar by three Judges without a jury, as may be decided by the Chief Justice. The provisions of Section 450 and 451 of the Code of Criminal Procedure Act, no. 15 of 1979, shall, mutatis mutandis, apply to the trial of offences under this Act*

by the High Court at Bar and to appeals from judgments, sentences and orders pronounced at any such trial held by the High Court at Bar". By Amendment Act, No. 12 of 2022 Section 15B was inserted which stipulates the following:

> *"Notwithstanding anything to the contrary in the provisions of this Act, if the trial against a person remanded or detained under this Act has not commenced after the expiration of twelve months, from the date of arrest, the Court of Appeal may release such person on bail, upon an application in that behalf, made by the suspect or an Attorney- at-Law on his behalf:*
>
> *Provided however, notwithstanding the provisions of subsection (2) of section 15, the High Court may in exceptional circumstances release the suspect on bail subject to such conditions as the High Court may deem fit:*
>
> *Provided further, where the trial against an accused in respect of whom the indictment has been forwarded and filed in the High Court, has not commenced after the expiration of twelve months from the date of such filing, the High Court may consider to release such person on bail, upon an application in that behalf made by the accused or an Attorney- at-Law on his behalf.".* (Emphasis added)

Legislative intention behind Section 15B

Prior to the introduction of Section 15B, the PTA did not envision an instance whereby a court may grant bail to a person suspected or accused under the Act. (See- **Nithyanathan and Others Vs. Attorney General** 20031 SLR 399) Litigants had to sort recourse outside the PTA such as the Constitution and the Code of Criminal Procedure Act, No. 15 of 1979 as amended (*hereinafter the CPC*), to seek redress. However, with the enactment of Act, No. 12 of 2022, the legislature has explicitly recognised the jurisdiction of the High Court and the Court of Appeal to release suspects arrested under the PTA under specific circumstances. Hence, when a judge is met with the task of interpreting Section 15B, such interpretation must reflect the legislative thinking which prompted a pivot from the historical intentions of the PTA.

A perusal of the Parliamentary Debates (Hansard) Volume 189, No 5, Column 780 to 789 dated Tuesday, 22nd March 2022 concerning Act, No. 12 of 2022 allows one to ascertain the legislative intention behind the said amendment to the PTA.

The Minister of Foreign Affairs, the Hon, (Prof.) G. L. Peiris presented the amended Bill, whereby he highlighted the need to revisit the provisions of the PTA in keeping with the basic social transformation and circumstances, priorities, and objectives of the country since its enactment in 1979. The Minister remarked as follows*:*

> *"Having regard to all the changes which have taken place in our country during the last 43 years, we have whittled down the provisions of the Prevention of Terrorism Act, diminished its rigidity in a manner that is appropriate to the present stage of development of Sri Lankan society. We have stopped short of abolishing it altogether. That is too extreme a step and lacks a sense of balance" (Column-788).*

Another instance where the Hon. Minister remarked on the ethos of the Act, No. 12 of 2022 is in Column 780 of the Hansard:

> *".......when you take the Amendments a whole, in combination, I make bold to say that the cumulative effect of these Amendments is to make a very substantial improvement of the existing law.........I can convince any objective fair-minded person that these Amendments, without any extraneous agenda, will make a profound impact upon the existing laws of this country and that these Amendments will significantly further the cause of human rights and human freedoms in Sri Lanka".*

I would like to pause at this juncture and refer to a judgment delivered by this Bench prior to the enactment of Act, No. 12 of 2022. In **Hejaz Omer Hizbullah v Hon. Attorney General** CA/PHC/APN/10/2022 CA Minute dated 07.02.2022, this Bench acting in revision, granted bail to the petitioner who was an accused under the PTA by relying on Article 145 of the Constitution. It must be highlighted that the judgment in Hejaaz Omer Hizbullah (supra) pivoted on the application of Article 145 of the Constitution and the powers vested with the Court of Appeal therein. Therefore, it must be noted that the power of granting bail by the Court of Appeal in exercising its revisionary powers under Article 145 of the Constitution in the interests of justice is by

no way undermined by the new amendment Act, No. 12 of 2022. It is the considered views of this Court that the powers of the Court of Appeal under Article 145 of the Constitution remain intact and remains to be exercised in the appropriate case. In the said judgment, this Bench evaluated the factual circumstances in the interest of justice and made the following observation in anticipation of Act, No. 12 of 2022: *"..Even the executive branch of the government is considering the amendment of the PTA (The Gazette of the Democratic Socialist Republic 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"* (at page 6). In the same light, the Hon. Minster made the following remarks during the Parliamentary debate of the amending Bill (supra)*:*

> *"……..this has been a perennial tension though all civilizations – security, on the one hand, and liberty, freedom, on the other. You have to arrive at an equilibrium between these two, a perceptive balance which has to be made in relation to contextual factors, the circumstances that are applicable to a particular society at a particular stage of its development"* (column 788 of the Hansard).

Moreover, the Hon. Minister reflected on the grave injustices caused by a strict bar against the release of suspects arrested under the PTA in its unamended version*:*

> *"……………the existing position in our country is that there can be and there had been, in some cases, unfortunately, and interval as long as six months or nine months between one date of trial and another, this means that the person who is subject to the Determination Order is languishing in custody for unjustifiably long periods because the trial is taking so long"* (column 781 of the Hansard).

The Hon. Minister compares the state of the law prior and subsequent to the proposed Bill (Act, No. 12 of 2022 as it stands now) as follows*: "under the existing law or the PTA, as it stands now, once a trial commences, until it is concluded, the High Court Judge is compelled to keep the accused, the suspect, in detention or in remand. That is no longer the case, ………………. After this Amendment is enacted into law, the High Court Judge,*

even while the proceedings are in progress, has the discretion to grant bail in '<u>appropriate cases</u>". (Emphasis added)

Speaking on the effect of the proposed Section 15B, the Minister stated that litigants may no longer be required to depend on the revisionary jurisdiction of the Court of Appeal, as was done in the case of **Hejaz Hizbullah** (supra), instead the PTA itself explicitly provides for avenues to make an application for bail. Speaking on the said Section, the Minister referred to *"legislative prescription"* in terms of vesting the High Court and Court of Appeal with the necessary and explicit jurisdiction to grant bail to suspects/accused under the PTA. This was deemed as countering the "discrepancies" created in the existing application of Section 15(2) of the PTA where there is an uncertainty as to whether the Court can or cannot intervene to release a person from custody (column 786 of the Hansard).

Thus, with the enactment of Act, No. 12 of 2022, the legislature has intended to address, to a certain extent, the perils of the PTA prior to the amendment. Furthermore, it is evident that the legislature seeks to generate a change in the manner in which the aspect of bail is handled under the PTA.

While the enactment of Act, No. 12 of 2022 is only a single step in the re-evaluation of national security laws of Sri Lanka, in interpreting the said amendment to the PTA, the judiciary ought to reflect the ethos and spirit of the legislation as explained above. In doing so, one must take caution to weigh the interests of public security and individual liberty on a case-by-case basis and make a sound determination so that the PTA is tamed against a reversion to its rigorous past.

Interpretation of Section 15B

Section 15B has explicitly recognized three stages at which a person arrested under the PTA is rendered an opportunity to make a request to be admitted to bail. By the operation of time and other specific instances which will be discussed later, a person arrested under the PTA is entitled to request bail either from the High Court or the Court of Appeal, as the case may be, and the legislature has explicitly recognized the jurisdiction of each court to grant bail under appropriate conditions.

Section 15B as contained in Clause 10 of Act, No. 2 of 2022 is reproduced below:

> *"Notwithstanding anything to the contrary in the provisions of this Act, if the trial against a person remanded or detained under this Act has not commenced after the expiration of twelve months, from the date of arrest, the Court of Appeal may release such person on bail, upon an application in that behalf, made by the suspect or an Attorney- at-Law on his behalf:*
>
> *Provided however, notwithstanding the provisions of subsection (2) of section 15, the High Court may in exceptional circumstances release the suspect on bail subject to such conditions as the High Court may deem fit:*
>
> *Provided further, where the trial against an accused in respect of whom the indictment has been forwarded and filed in the High Court, has not commenced after the expiration of twelve months from the date of such filing, the High Court may consider to release such person on bail, upon an application in that behalf made by the accused or an Attorney- at-Law on his behalf.".* (Emphasis added)

Hence, in Clause 10 of the Act, No. 12 of 2022, the legislature has stipulated three instances whereby a person remanded or detained under the PTA can make an application for bail either to the High Court or the Court of Appeal as the case may be:

1. If the trial has not commenced after the expiration of twelve months from the date of arrest, the Court of Appeal may release such person on bail (*hereinafter the first instance*)

2. If the indictment has been served and the person shows exceptional circumstances to be admitted into bail, the High Court may release such person on bail (*hereinafter the second instance*)

3. If the trial has not commenced after the expiration of twelve months since the forwarding and filing of the indictment in the High Court, the High Court may consider to release such person on bail (*hereinafter the third instance*) (emphasis added)

A <u>fourth instance</u> whereby a person can be released on bail under the PTA is contained in Clause 11 of Act, No. 12 of 2022. It repealed Section 19 and substituted it with the following:

> *"Notwithstanding the provisions of any other written law, every person convicted by any court of any offence under this Act shall, notwithstanding that he has lodged a petition of appeal against his conviction or the sentence imposed on him, be kept on remand until the determination of the appeal:*
>
> *Provided however, that the Court of Appeal <u>may in</u> <u>exceptional circumstances</u> <u>release</u> on bail any such person subject to such conditions as the Court of Appeal may deem fit.*" (Hereinafter <u>the fourth instance</u>) (Emphasis added)

Hence, the Court of Appeal can release a person convicted under the PTA on bail pending appeal upon satisfying the existence of exceptional circumstances.

As such, it is clear that with the advent of Act, No. 12 of 2022, the legislature has delineated more avenues for persons arrested under the PTA to request bail, whilst affording discretion to the judges to decide whether the circumstances of such persons warrant their admittance to bail. In all the four instances listed above, the legislature has utilized the phrase 'may' whereby judicial discretion has been reinforced.

While this liberal approach is quite the departure from the earlier rigidity, the application of the PTA in terms of bail still carries with its elements of judicial discretion. Each case must be viewed on the merits of its facts and circumstances and only in the appropriate case should the court exercise its discretion to release a person under the PTA on bail. To that end and as a guide for future interpretation, this Court would like to elaborate on the distinction between the four instances regarding bail envisaged by the Act, No. 12 of 2022. However, it must be reinforced that judicial discretion must be exercised based on the specific facts and circumstances of each case which may very well vary on a case-by-case basis.

This court will now deal with each of the instances delineated above.

First Instance

The <u>first instance</u> stipulates if the trial has not commenced after the expiration of twelve months from the date of arrest, the Court of Appeal may release such person on bail. Here is an instance where an indictment is yet to be served on the person and the person has been languishing in prison for more than twelve months since his arrest under the PTA. The *legislative prescription* of twelve month coupled with the absence of an indictment serves as a criterion as to when the jurisdiction of the Court of Appeal can be invoked under Section 15B. If not, the Court of Appeal will be inundated with litigation under the PTA. If either one of the criteria is not fulfilled, for example if twelve months have not expired or indictment has been served, an applicant cannot come before the Court of Appeal under Section 15B. For such applicants, recourse is available before the High Court, as will be discussed later.

It is pertinent to note that, the legislature has not provided for the grounds upon which the grant or refusal to grant bail may be considered by the Court of Appeal. It only delineates the criteria by which an applicant is eligible to apply for bail. The question of whether bail ought to be granted or not rests with the judicial discretion of the presiding judge.

To that end, some guidance can be taken from existing judicial precedent and legal principles pertaining to bail. While there is a wealth of judicial precedent on the law relating to bail, the celebrated judgment of **R v Toussaint** 12 NLR 65**,** made the following observation: "no doubt the main object of requiring bail is to ensure the attendance of a person charged with a criminal offence, but there are other considerations which the Court in the exercise of its discretion generally takes into account. The first accused is charged with very serious offence punishable with long terms of imprisonment". The judgment quoted the words of Grener AJ in **Etrenne Barromet v Edmond Allain,** Ellis and Blackburn, p. 1 "the Court has discretion to admit accused persons to bail in all cases, but in exercising that discretion the nature of the charge, the evidence by which it is supported, and the sentence which by law may be passed in the event of a conviction are in general the most important ingredients for the guidance of the Court, and where these are weighty the Court will not interfere."

Undoubtedly, any offence that threatens national security is of very serious nature. However, in dealing with such a case, the mere accusation of an offence under the PTA ought not to be regarded as an automatic refusal of bail. In line with the legislative intention in introducing Act, No. 12 of 2022 and the change it sought to achieve, the seriousness of the accusation should be viewed within the evidence available against the suspect. An act that may seemingly entail terrorist connotations cannot be viewed in isolation as it would not necessarily constitute a public emergency, threatening the life of a nation or national security. Nevertheless, the converse of the same may also be true. Given the complexity of dealing with national security as against individual liberty, courts should undoubtedly pay their attention to the finer nuances of an impugned act while exercising discretion. There must exist a serious threat to the national security or communal harmony. As referred to in the above quote, such evidence must be 'weighty' against a suspect to order his continued incarceration despite the lapse of twelve months since the arrest and the absence of an indictment. This is most pertinent considering the history of the application of the PTA in bail matters and the prolonged periods of incarceration that followed therein. With the advent of Act, No. 12 of 2022 the legislature has sought to depart from the normalcy of prolonged incarceration under the PTA and has sought to generate a change where individual liberty is secured in tandem with the protection of national security. Therefore, the prosecution must satisfy why a person must continue to be incarcerated over a prolonged period under the PTA, it can no longer be an automatic state of affairs. Instead, defining national security in precise terms would be a challenging task. In, **Ex-Armymen's Proetction Services Private Limited Vs Union of India and Others** [(2014) no.2876/14] decided by the Indian Supreme Court where Kurian J. observed as follows: -*"It is difficult to define in exact terms as to what is national security. However, the same would generally include socio-political stability, territorial integrity, economic solidarity and strength, ecological balance, cultural cohesiveness, external peace etc. What is in the interest of national security is not a question of law. It is a matter of policy. It is not for the Court to decide whether something is in the interest of State or not. It should be left to the Executive*. In the House of Lords, Lord Hoffman **in Secretary of State for the Home Department v Rehman** (2001-UKHL 47 p) stated *"The matter of national security is not a question of*

law. It is a matter of judgement and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interest of national security are not a matter for judicial decision. They are entrusted to the executive".

This Court will not attempt to delineate an exhaustive list of considerations that a presiding judge ought to take cognizance of when dealing with the bail application under the PTA as amended by Act, No. 12 of 2022. Nevertheless, the rationale behind the concept of bail and the fundamental tenets therein must be considered when approaching its application.

In general, the right to bail is a universal concept for it is derived from a connate sense of justice which embeds values such as liberty and equality at its core. This concept is centered upon the principle of "presumption of innocence until proved guilty" which seeks to preserve the liberty of an individual and the right to be abstained from arbitrary arrest, detention or held in custody prior to a conviction beyond a reasonable doubt. This principle is entrenched in many regional, domestic and international legislations under the rubric of fundamental, civil and political rights. Sri Lanka has endorsed this principle under the Supreme law of the land: the Constitution. Article 13(5) of the Constitution stipulates that "Every person shall be presumed innocent until he is proved guilty". Similarly, the International Covenant on Civil & Political Rights (ICCPR), under Article 14(2) stipulates that a person is presumed to be innocent until proved guilty. Article 11 of the Universal Declaration of Human Rights further cements the principle of presumption of innocence. As reverberated by Justice V.R. Krishnaiyer in **Gudikanti Narasimhulu and Others vs Public Prosecutor, High Court of Andhra Pradesh** 1978 AIR 429, 1978 SCR (2) 371 *"The issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process".*

Hence, when considering the grant of bail under the amended PTA which requires the discretion of the court, one can refer accepted considerations such as the gravity and severity of the offence and the nature of accusation; severity of punishment if convicted; the likelihood of the accused fleeing from justice; the possibility of tampering with the evidence and/or the witnesses; the possibility of repetition of the offence or similar

offence while on bail; the prima facie satisfaction of the court in support of the charge including frivolity of the charge; the peculiar facts of each case and nature of supporting evidence etc. When the circumstances of a particular case is viewed in totality with other consideration such as the personal standing of the applicant and his or her ability to take part in the justice process in light of their personal commitments may also be considered. More importantly, courts can take cognizance of the progress made by investigating and prosecutorial authorities to process a complaint.

Unreasonable delay in that aspect would usually be favorable to the applicant, as courts are increasingly opening itself to new technology as means of expediting the proper administration of justice. As the legislature intervenes to further justice in concurrence with the changing world, other organs involved in the justice system must follow suit and attempt to break away from age old processes and primeval practices that stands in the way of administration of justice. Additionally, courts may weigh contrary factors such as promotion of public fairness and public evolutionary policy, the considerable public expense in keeping a suspect/accused in custody where no danger of disappearance or disturbance can arise. However, the most important aspect to guide the release of suspects on bail should be to ensure the presence of the suspect who seeks to be liberated, to face the trial to take judgment and serve sentence in the event of the court convicts and punishing him with imprisonment. As such the likelihood of a person absconding for fear of a severe sentence under the PTA can be considered. All these possible considerations must be viewed in relation to one another and the facts of a case when judicial discretion is utilized. They cannot be viewed in a vacuum.

As such, when a person has been arrested and no indictment has been served against them despite the period of incarceration has prevailed for 12 months, under the first instance, such person will be eligible to apply for bail. Thereafter, the presiding judge may utilize the above discussed consideration in exercising judicial discretion to determine whether bail should be granted or not.

Before dealing with the second instance, the third instance will be discussed.

Third Instance

The third instance stipulates that if the trial has not commenced after the expiration of twelve months since the forwarding and filing of the indictment in the High Court, the High Court may consider releasing such person on bail. This provision encounters a situation where an indictment has been forwarded and filed. Hence this is a distinctly different scenario to the first instance discussed above.

In the third instance, jurisdiction of the High Court to grant bail can be invoked upon the fulfilment of two criteria, namely, the serving and filing of indictment and the absence in the commencement of trial even after the expiration of twelve months since such filing. The similarity between the first instance and the third instance is that neither stipulates any grounds for consideration in exercising the judicial discretion to either grant or refuse to grant bail. Nevertheless, as discussed in the previous part, some guidance can be derived from existing precedent and principles subject to the caveat that each case ought to be decided on its peculiar facts and circumstances. Yet a slight dissimilarity is present in the wording of the first and third instances.

In the first instance, the legislative language is 'the Court of Appeal may release.'. However, in the third instance the language used is 'the High Court may consider to release.'. This slight variation is a recognition of the difference between the two situations where in the former (first instance), an indictment is yet to be served. In the latter scenario (third instance), the Attorney General has perused the IBEs and has decided that the evidence against the accused has a reasonable prospect of securing a conviction or that there exists a *prima facie* case to proceed with the prosecution. In such a context, the High Court Judge has discretion to either consider the bail application or refuse to do so. However, this does not mean that the High Court judge ought to dismiss the application *in limine*. It is a mere expression that the burden on the applicant requesting for bail is slightly higher in the third instance, than it is in the first instance. Because in the latter, the prosecution is yet to decide whether a case can be sustained against the suspect.

Second Instance

The second instance is provided in Section 15B as "*Provided however, notwithstanding the provisions of subsection (2) of section 15, the High Court may in exceptional circumstances release the suspect on bail subject to such conditions as the High Court may deem fit*". Section 15(2) envisions a situation where indictment has been served on the suspect. Whilst at first glance this seems quite similar to the third instance discussed above, the distinction lies in the inclusion of 'exceptional circumstance' criteria and exclusion of a legislative prescription (twelve months). Here, unlike in the first and third instances, the legislature has designated a ground upon which the court must decide the issuance of bail or the lack thereof.

As such, under the second instance, the High Court's jurisdiction for bail can be invoked, even if the trial has commenced. This stipulation caters to instances where the facts of the case present some exceptionality that warrants the release of the suspect from incarceration. The Legislature's inclusion of 'exceptionality' in the second instance, and its exclusion in the first and third instances must be given due recognition in exercising judicial discretion.

While the term 'exceptional circumstance' has not been defined in Act, No. 12 of 2022, it is evident that the burden on the applicant is much higher than the first and third instances explored above. Similar exceptionality is required in the case of bail pending appeal under Act, No. 12 of 2022 as evinced from Section 19, referred to as **the fourth instance** in the instant examination.

As such, the fourth instance designates the following:

> "*Notwithstanding the provisions of any other written law, every person convicted by any court of any offence under this Act shall, notwithstanding that he has lodged a petition of appeal against his conviction or the sentence imposed on him, be kept on remand until the determination of the appeal:*
>
> *Provided however, that the Court of Appeal may in exceptional circumstances release on bail any such person subject to such conditions as the Court of Appeal may deem fit.*" (Emphasis added))

Therefore, in both the second instance and the fourth instance, an applicant must satisfy the High Court (in the second instance) and the Court of Appeal (in the fourth instance), as to the existence of exceptional circumstances. Ultimately it will be up to the judicial discretion to decide whether the exceptionality contended warrants admittance of the applicant into bail.

Exceptional Circumstances

As examined in the previous section, the PTA as amended by Act, No. 12 of 2022 explicitly recognized four instances in which a person arrested under the PTA is granted the opportunity to make an application to be admitted to bail. In doing so, the legislature designates two occasions (second instance and fourth instance) whereby the Court of Appeal or High Court may, in exceptional circumstances release a suspect on bail. Alternatively, it must be noted that the lack of mention of 'exceptionality' in the first and third instances should not lose its importance as well.

However, the Act, No. 12 of 2022 does not indicate the manner in which exceptional circumstance needs to be interpreted. In general terms, an 'exceptional circumstance' is an instance which occurs out of the ordinary, unavoidably or unexpectedly. For the purpose of the Act, No. 12 of 2022, it is clear that the presiding judge in the PTA matter has the sole power and discretion to decide instances that fall within the ambit of exceptional circumstances.

For example; if a bail application is pleaded on the ground of severe health condition of an accused/suspect, the court must be satisfied that the said health condition is either life-threatening or that such a health condition cannot be treated while in remand which poses the threat of aggravating the illness. Further, in instances of oppressiveness and lack of progress in serving an indictment, the courts may be enlightened to consider such oppressiveness and inordinate delays as exceptional circumstance to grant bail. The Act, No. 12 of 2022, to a certain extent, recognizes the values endorsed in human freedom and fundamental rights guaranteed by the Constitution of the country. Hence, it is the duty of the court to prevent the stringent, mechanical and monotonous application of rules and instead, espouse the judicious use of discretion in an appropriate manner based on the facts and circumstances of each case. Exceptionality

of suspects would vary from one case to another. Thereby, it is essential for the courts to pay close attention to each case in a meticulous manner.

Moreover, judgments pronounced under exceptional circumstances should not be pronounced in a prejudiced manner or to impress a particular party. Apart from considering human freedom and fundamental rights of the suspect (such as presumption of innocence until proven guilty), the court has to give prominence to the impact a particular suspect may have in the society in terms of public security and communal harmony. Thus, the court must weigh the interest of the public security against the individual liberty on a case-by-case basis.

In summation, Act, No. 12 of 2022 has amended the PTA to provide four instances where the High Court and Court of Appeal is granted explicit jurisdiction to release a person arrested/ detained under the PTA on bail upon the fulfilment of certain criteria. In the first and third instances, certain criterion are stipulated to qualify for the invocation of the respective court's jurisdiction such as *'legislative prescription'*, serving of indictment or not, beginning of trial or not. After such qualification, the respective court can use its discretion to decide whether the facts present an appropriate case to release the litigant on bail. To that end, guidance may be had on existing case law precedent on bail. In the second and fourth instance, the respective court will only grant bail if the applicant proves exceptional circumstances.

It is evident that the PTA as it stands today envisions a hierarchy in the burden placed on an applicant for bail at each of the four instances recognized in Section 15B and Section 19. These four instances ought to be viewed in connection to each other as opposed to in a vacuum in deciding the way judicial discretion ought to be exercised. At each instance, the legislative intention behind the enactment of Act, No. 12 of 2022 must be visited and the relevant section interpreted according to the facts and circumstances of each case. It must be stressed that the requirement of exceptionality is restricted only to two out of the four instances of granting bail under the PTA as amended by Act, No. 12 of 2022.

At this juncture, it is pertinent to refer back to Hon. Minister's speech at Column 788 of the Hansard (supra) where he remarked on the applicability of the PTA. The Minister

stressed that the provisions of the PTA must be resorted to only in very exceptional circumstances stating that *'It cannot be the norm; it is not the rule it is very much the exception" whilst referring to the "normal provisions of the law" (for example the Criminal Procedure Code) to be accepted as a norm and that "it is only in very exceptional cases where there is manifest evidence indicative of some terrorist dimension that recourse to the Prevention of Terrorism Act will be justifiable".* Therefore, when presented with a bail application under the Act, No. 12 of 2022, the presiding judge may also consider whether the PTA has been applied in the correct manner so that the true intention of the new amendment is fully realized. The observation made by a five bench judges in the Supreme Court in Attorney General Vs Sumithipala 2006 2 SLR 126 is more appropriate to the present context. *"A judge cannot under a thin guise of interpretation usurp the functions of the legislature to achieve a result that the judge thinks is desirable in the interest of justice. Therefore, the role of the judge is to give effect to the expressed intention of Parliament as it is the bounden duty of any court and the function of every judge to do justice with in the stipulated parameters".*

The advent of Act, No. 12 of 2022 signifies a major change of legislative policy in the application of the PTA where the policy to granting bail in "appropriate cases" using the "discretion of the courts" have been incorporated. The true manifestation of this policy initiative will only be possible if the courts interpreting and applying the said law, respect such policy initiative. Act, No. 12 of 2022 upholds the values endorsed in human freedom and fundamental rights guaranteed by the Constitution of the country. Hence, it is the duty of the court to prevent the mechanical application of rules and espouse the judicious use of discretion in an appropriate manner based on the facts and circumstances of each case. It is the duty of the presiding judge to interpret the amended PTA in line with this thinking so that the legislative intervention of curbing the rigid elements of the PTA is reinforced by judicial interpretation and application. The following passage of the Lord Denning MR in the case of **Ward vs James** (1965) 1 ALL ER 563 at 571 is precisely applicable to the context of present day. His Lordship stated that *"the cases all show that when a statute gives a discretion the courts must not fetter it by rigid rules from which a judge is never at liberty to depart. Nevertheless, the Courts can lay down the considerations which should be borne in mind in exercising the discretion and point out those considerations which should be ignored. This will normally*

determine the way in which the decision is exercised and thus ensure some measure of uniformity of decisions. From time to time the considerations may change as public policy changes and so the pattern of decisions may change. This is all part of the evolutionary process" (emphasize added).

Analysis of facts

Accordingly, with the above backdrop in mind, it is fitting to delve into the nuances of the matter at hand. Firstly, in determining the *locus standi* of the petitioner to appear on behalf of the suspect, recourse to Section 15B of the PTA as amended can be had which stipulates that "*upon an application in that behalf, made by the suspect or an Attorney- at-Law on his behalf*"

This section expressly provides for the representation of a suspect in detention or in remand by an Attorney-at-law in an instance where the suspect is unable to appear himself. This is further buttressed by Section 10A of the PTA as amended, which further states an Attorney-At-Law has access to persons remanded or detained under the PTA and representations can be made on behalf of such persons subjected to the regulations and conditions prescribed therein. Therefore, in light of the above law, it is clear that a person detained or remanded under the PTA can be represented by an Attorney-At-Law as relatives have limited and restricted access to the suspect. (See also Section 10A (2) of the PTA as amended in this regard). Hence, the representation of the suspect of the instant case by the petitioner who is an Attorney-At-Law is prescribed by the law and is apropos.

It is now pertinent to lay out the analysis with respect to the averments and the objections made by the respective parties. The petitioner avers that the suspect has been held in incarceration for 3+ years without an indictment been served. As expounded above, there are four instances in which a suspect can be enlarged on bail by either the High Court or the Court of Appeal. The instant application falls under the first instance in which the Court of Appeal can consider enlarging a suspect on bail.

According to the first instance as expounded earlier, the criterion to invoke the jurisdiction of the Court of Appeal comprises of the expiration of the prescribed period of 12 months and the absence of an indictment been served. This instance necessitates

the fulfillment of both limbs of the criterion to invoke the jurisdiction of the Court of Appeal in order to consider granting bail to the suspect under Section 15B of the PTA as amended. This Court observes that the suspect has been held in incarceration for 3+ years which clearly exceeds the legislative prescription of the PTA as amended. The respondents have failed to provide a certain indication of when an indictment could be served. Thereby, the jurisdiction of the Court of Appeal can be invoked with respect to considering the grant of bail to the suspect.

In her submissions, the learned DSG appearing on behalf of the respondents referred to the cases of **Wickramasinghe v Attorney General and Another**, 2010, 1, SLR 144p, and **Shiyam Vs Police Narcotic Bureau** 2006 B.L.R. 52p and stressed the following passage in order to highlight the fact that the Bail Act will not be applicable in an instance where the law has expressly provided for bail under Section 3 of the Bail Act and to emphasis that it was not the intention of the legislature to release each and every suspect who has been on remand for period exceeding 24 months. But this is not the correct position after the introduction of Act No. 12 of 2022, court has a discretion to consider bail, where a suspect/accused accomplishes the *'legislative prescription'*, as I explained above.

This Court concurs with the submission to the extent that the Bail Act is excluded when bail is considered under the PTA. Under general law bail is governed under the Bail Act, No.30 of 1997, the CPC and other legislations which expressly provide for the release of persons on bail. Section 3(1) of the Bail Act stipulates that "*Nothing in this Act shall apply to any person accused or inspected 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 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 law*". Hence, it is precisely clear that by virtue of the above section, the provisions of the Bail Act would not be applicable to a suspect being charged under the provision of the PTA. Yet the said inapplicability does not translate to an exclusion of the fundamental principles governing bail. It can be interpreted to mean that a suspect arrested under the PTA cannot apply for bail under the Bail Act but must rely on the PTA as amended or other

avenues such as the Constitution. Similarly, the designation of the four instances of bail as envisioned in Act, No. 12 of 2022 does not apply to bail matters governed under the Bail Act. Therefore, the exclusion of the Bail Act on matters falling under the PTA as amended does not exclude the application of the principles of the law governing bail. As expounded above, the core principles that underlie the concept of bail which can be derived from case law emanating from the Bail Act can serve as guidance to the exercise of judicial discretion under the PTA as amended.

Although, the learned DSG has cited **Wickremasinghe Vs A.G (**supra) to rule out the application of the Bail Act and to justify the long period of incarceration of the suspect, this Court would like to draw attention to the rationale of the case where it was held that "*Purpose of remanding a suspect / accused is, in my view 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 a suspect/ accused in order to punish him*". (At page146). This case sheds light on one of the core principles of granting bail to a suspect which is that refusal to grant bail cannot be construed as a form of punishment to the suspect. In an instance where the court is convinced that the suspect will not abscond and will appear before the court where necessary, the court has the discretion to consider such factors in determining whether to refuse or grant such persons on bail in the interest of justice.

Furthermore, it is observed by this Court that the learned DSG has not objected the grant of bail to the suspect on any substantial grounds like the possibility of the suspect absconding, tampering with witnesses, posing a threat to the national security and communal harmony or the possibility of the suspect reoffending if released out on bail. The learned DSG has failed to convince this Court of the reasons as to why the court should not enlarge the suspect on bail. The learned DSG has merely announced that the investigations are almost over as they are still awaiting the government analyst report and has mentioned that the indictment will be served in the near future, albeit an exact time frame has not been provided which leaves this Court with the impression that the time of indicting the suspect is still indefinite.

Against such a submission, the facts available before this Court presents that the suspect has shared a video and information via an entity that is alleged to have links to

ISIS. These facts alone do not warrant an incarceration for over 3+ years, especially in a context where an indictment has not been served. On the one hand, the suspect has exercised his freedom of expression and on the other, the prosecution has failed to gather any substantive evidence during the course of the said 3+ years to justify the continuation of the incarceration. The mere sharing of a video which express a view or amounts to a seeming act that threatens national security does not warrant a period of incarceration exceeding 46 months. The inability of the respondents to forward an indictment for 3+ years further points to the lack of possibility to begin a prosecution based on the material available against the suspect.

The learned DSG's contention that the suspect should not be enlarged on bail and that the delay in receiving the government analyst's report has caused the delay in tying up the investigations is unacceptable. As stressed above, for the true potential of Act, No. 12 of 2022 to be realized, all arms of the law enforcement in the country must work in tandem to expedite justice. While the contention of the DSG on the delay may have been a sufficient ground for continued incarceration under the PTA prior to its amendment in 2022, as the law and the state of affairs stand today, it is not. Given the abundance of technology to expedite proceedings at the hand of law enforcement units, the judiciary cannot endorse restriction of personal liberty for delays on the part of the prosecution to build a substantive case against a person. Such an endorsement would be contrary to justice and tantamount to oppression of the suspect. As such the position of the prosecution is not "weighty" when compared to the submissions of the petitioner in light of the legislative intention behind the application of Act, No. 12 of 2022.

The law does not allow for the construing of inordinate delays and prolonged period of incarceration as a form of punishment and thus, the law enforcement units have a duty to ensure the protection of the personal liberty and the fundamental rights of an individual to be free from arbitrary arrest and detention. The prolonged period of incarceration has aggrieved the family members of the suspect and has also squandered the youth of the suspect as he has spent an inordinate number of years in detention without a firm indication of being indicted and being able to present averments against such indictment. This is a clear manifestation of contravention of the basic rights of the suspect and a blatant disregard of justice, a very fact that is sought to be tamed by the advent of Act, No. 12 of 2022. As I mentioned above and in line of the thinking of the

lawmakers, it has been a perennial tension though all civilizations – security, on the one hand, and liberty, freedom of an individual on the other. This Court has to arrive at an equilibrium between these two, a sensitive balance which has to be made in relation to contextual factors.

Hence, taking into consideration the lack of a rational basis to refuse to enlarge the suspect on bail and the prolonged period of incarceration of the suspect without an indictment being served, brings the suspect within the framework laid under Section 15B of the PTA as amended, thereby enabling the suspect to be granted bail by the jurisdiction of the Court of Appeal. Therefore, in light of the above contentions, it is the considered view of this Court, the suspect should be enlarged on bail.

Thus, this Court, while urging the authorities to expedite the matter, orders the suspect to be enlarged on bail upon the following conditions.

Bail conditions

1. A cash Bail of Rupees One Hundred Thousand (Rs 100,000/-_).
2. Two sureties acceptable to the learned Magistrate Colombo Fort, to the value of 500,000/- each.
3. Suspect to report to the Head Office of the Criminal Investigation Department every 2nd and 4th Sunday of every month between 9.00 am – 3.00 pm.
4. Passport or any travel document to be surrendered to the Magistrate of Colombo Fort if it has not been done so.
5. Suspect should not change his permanent residence without informing the Magistrate of Colombo Fort and permanent residential address to be submitted to the Registrar of the Magistrate Court of Colombo Fort certified by the relevant Grama Seva Officer.
6. The suspect is severely warned not to interfere with the investigation or witnesses under any circumstances.

7. Violation of one or more conditions set out above amounts to cancel this bail order.

Registrar of this Court is directed to dispatch a copy of this order to the Magistrate of Colombo Fort.

Bail granted.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL