CRIMINAL REVISION.

Before Rankin C. J. and C. C. Ghose J.

RAMESWAR KHERORIWALLA

v.

EMPEROR.*

1928

March 15.

Jurisdiction—Habeas corpus—Power to issue directions of the nature of a habeas corpus, *whether should be exercised by the appellate jurisdiction of the High Court or original jurisdiction—Criminal Procedure Code (Act V of 1898), s. 491.*

Under the Criminal Procedure Code, as it stands now, the powers conferred by s. 491 of the Code are applicable to persons within the limits of the High Court's Appellate Criminal Jurisdiction, and it is more convenient that such powers should be exercised by the Division Bench appointed to deal with criminal cases.

It is not, however, evident upon the face of the Criminal Procedure Code that the powers of the High Court under s. 491 of the Code might not, apart from any special rule made under the Letters Patent or any directions given by the Chief Justice, competently be discharged by a single Judge.

A Division Bench dealing with criminal cases is in no way a Court of Appeal from a Judge exercising the Ordinary Original Criminal Jurisdiction.

It would be a good return to a writ in the nature of *habeas corpus* to show that the applicant during his trial at Sessions was being detained under an order of the High Court, which had not been set aside or varied.

CRIMINAL RULE.

The petitioner, Rameswar Kheroriwalla, was committed to take his trial at the Criminal Sessions of the High Court by the Chief Presidency Magistrate, Calcutta, on the 23rd January, 1928. On the following day, the petitioner applied for bail under section 496 of the Criminal Procedure Code, inasmuch as all the charges against him were bailable offences. The petitioner was released on bail, on his furnishing two sureties for Rs. 60,000 each, as also on executing his personal bond for Rs. 1,20,000. Thereafter, on the 21st February, 1928, the petitioner's

* Criminal Miscellaneous No. 36 of 1928

solicitors were served with notice to show cause why the bail should not be cancelled on the ground that the petitioner was alleged to have been tampering with two of the witnesses for the prosecution.

The application was heard and bail was cancelled, the petitioner's sureties discharged and the petitioner committed to the custody of the Inspector-in-charge of the undertrial prisoners in the High Court, who took him into custody and removed him to the Presidency Jail. A fresh application for bail under section 496 of the Code was made on the 27th February, 1928, and refused by Mr. Justice Buckland.

The petitioner, thereupon, made an application before the Division Bench taking up criminal matters (Chotzner and Lord Williams JJ.) and obtained a Rule calling on the Commissioner of Police, Calcutta, and the Superintendent of the Presidency Jail to show cause why the petitioner should not be brought up before the High Court under the provisions of section 491 of the Code.

Mr. Langford James (with him *Babu Satindra Nath Mukerji*), for the petitioner. Buckland J. acted illegally in cancelling bail and subsequently in refusing the application for bail, in view of sections 496 and 497 of the Criminal Procedure Code, which are on a line with the law in England with regard to felony and misdemeanour. In the case of felony, bail is discretionary, but in the case of misdemeanour, it is compulsory: *In the matter of Nagendra Nath Chakravarti* (1), *Mahendra Singh* v. *Emperor* (2). The petitioner has, therefore, been illegally detained and Buckland J. had no jurisdiction to cancel the bail bond and to have the man re-arrested and committed to custody. The writ of *habeas corpus* was the proper remedy in such cases. The jurisdiction of the High Court that is invoked is not revisional jurisdiction, but original jurisdiction, which, in such cases, by the rules of the Court, is to be exercised by the Judges sitting in the Criminal Bench.

(1) (1923) I. L. R. 51 Calc. 402. (2) (1919) 14 C. W. N. cxxxviii.

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In England also, the proper remedy in cases where bail has been rejected is by writ of *habeas corpus*: Halsbury's "Laws of England," Vol. 10, p. 168, *Ex parte Newton* (1). Buckland J. cancelled bail on the ground that the petitioner, while on bail, attempted to tamper with witnesses. That was no ground for cancelling bail and this Court has power to issue a writ irrespective of whether the trial had started or not or whether the order cancelling bail was passed by a High Court Judge or not. The only consideration in granting or refusing bail was whether the attendance of the accused would be insured at the trial: *Pigot* v. *Ali Mahammad Mandal* (2). Section 561A, Cr. P. C. cannot be invoked in support of the Judge's order, for that section never permits the Court to do what the Code does not empower it to do. It does not create a power, but merely recognizes the power which always existed in Courts. The High Court is not powerless to rectify an illegal order passed by a High Court Judge. The word "may" in section 491, Cr. P. C. means "must". See Craie's "Interpretation of Statutes," p. 252.

[GHOSE J. But Mr. Justice Buckland is the High Court.]

Not for the purpose of this section. See the definition of "High Court" in section 4(*i*), Cr. P. C.

[RANKIN C. J. Could you get an appeal by having recourse to section 491 from an order refusing bail?]

A man cannot be said to be improperly detained in case bail was refused by a Judge having jurisdiction to do so.

[RANKIN C. J. Is there any case in the English reports where the writ was granted after bail had been refused?]

See *In the Matter of Annie Frost* (3).

[RANKIN C. J. Is it not a good return to the writ to say that the prisoner is being detained under orders of the Judge?]

(1) (1855) 24 L. J C. P. 148. (2) (1920) I. L. R. 48 Calc. 522.
(3) (1887) 4 T. L. R. 757.

Not unless the order is a legal order.

The Advocate General (*Sir B. L. Mitter*) with him the *Deputy Legal Remembrancer* (*Mr. Khundkar*) and *Babu Mrityunjay Chattopadhyay* for the Crown. See clauses 22 and 36 of the Letters Patent. The High Court exercises in these cases Ordinary Original Criminal Jurisdiction, which is exercisable by a single Judge. Buckland J. was, therefore, exercising such jurisdiction. The return to the writ was "I "detained this man under orders of the High Court". That order cannot be set aside except by way of appeal or revision. In the case of *Ex parte Newton* (1), the High Court had superior and not co-ordinate jurisdiction. Buckland J. had jurisdiction to pass the order he did; and so long as that order stood, the return to the writ was a good return. Section 491 says "whenever it thinks fit" and this is not a fit case. The prisoner is undergoing trial and you cannot direct him to be set at liberty. *In the Matter of Bonomally Gupta* (2) shows that sometimes there is no remedy under the Code, but application may be made to the Crown. The prisoner is really asking for a revision of the order of Buckland J.

[RANKIN C. J. What do you say about the learned Judge's jurisdiction to cancel bail?]

He had jurisdiction to do wrong as much as to do right. The order was necessary in the ends of justice.

[RANKIN C. J. But the return would be a bad return if the order was without jurisdiction and illegal.]

The order is not attacked in this Rule. The order stands and is a good order. The order is not a nullity; at most, it may be said to be a wrong order. It can nevertheless be supported under section 561, Cr. P. C.

Mr. James, in reply. Buckland J. had jurisdiction to entertain an application for cancellation of bail,

(1) (1855) 24 L. J. C. P. 148.

(2) (1916) I. L. R. 44 Calc. 723, 732.

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but could not pass an order which he had no jurisdiction to make. Crown had no power to interfere at this stage as suggested by the Advocate General. The order under which the prisoner was detained was an illegal order, for bail could only be cancelled in cases contemplated by sections 501 and 502, Cr. P. C., where sureties are insufficient or sureties themselves applied for discharge of the bond.

Cur. adv. vult.

RANKIN C. J. In this case, Rameswar Kheroriwalla has obtained a Rule, calling upon the Commissioner of Police and the Superintendent of the Presidency Jail to show cause why the petitioner should not be brought up before the Court under the provisions of section 491 of the Criminal Procedure Code.

The applicant was committed by the Chief Presidency Magistrate for trial by the High Court at Sessions in the Ordinary Original Criminal Jurisdiction upon charges under several sections of the Indian Penal Code. Each of the charges relates to an offence described as bailable in the Second Schedule to the Criminal Procedure Code. On the 24th of January, 1928, the applicant was released on bail by the order of Mr. Justice Page. Thereafter an application was made to Mr. Justice Buckland on behalf of the Crown for an order cancelling such bail upon the ground that on the 13th, 14th and 16th of February, 1928, the applicant had approached certain witnesses for the purpose of influencing their evidence at the trial. Mr. Justice Buckland on the 24th of February, 1928, made an order cancelling the bail, discharging the bail bond and committing the applicant to custody pending his trial.

The learned Judge in his judgment has carefully considered the meaning and effect of sections 496 and 561A of the Criminal Procedure Code. He has come to the conclusion that the Court has power under the latter section to make such an order, assuming there to be no power otherwise. It is apparent

from his judgment that this question was fully argued before him.

This Rule came on for hearing before us on the 8th of March, by which time the trial of the applicant had begun and was proceeding *de die in diem*. There can be no doubt, therefore, that the applicant is at present properly and lawfully detained in public custody, while the trial proceeds. The only order which we have been asked on behalf of the applicant to make is an order that would direct him to be brought before this Bench after the High Court Sessions had adjourned for the day and which would provide for the applicant to be set at liberty (upon his giving sufficient security) during the adjournments of the Sessions Court.

The argument on behalf of the applicant is first that in view of section 496 of the Criminal Procedure Code, the learned Judge exercising the Ordinary Original Criminal Jurisdiction of the Court had no jurisdiction in the circumstances to direct the cancellation of the applicant's bail or to direct his re-arrest; secondly, that, accordingly, the applicant is a person illegally detained in public custody. If these points be made out, then by the terms of section 491, the High Court may, if it thinks fit, direct that the applicant be set at liberty or be dealt with according to law.

The High Court, which by section 491, is invested with certain powers, is defined by section 4 (*j*) to mean "the highest court of criminal appeal or revision for "any local area". This means for the present purpose the High Court of Judicature at Fort William in Bengal, which may act under clause 36 of the Letters Patent by any Judge or any Division Bench thereof, subject to any rules that may be made or directions that may be given by competent authority. In practice, until recently, the powers conferred by section 491, which, before 1923, were exercisable only over persons within the limits of the Ordinary Original Civil Jurisdiction of the Court, were exercised by the Judge taking sessions, that is, by the Judge exercising the Ordinary Original Criminal Jurisdiction of the Court.

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Now that the powers are applicable to persons within the limits of the Court's Appellate Criminal Jurisdiction, it is certainly more convenient that they should be exercised by the Division Bench appointed to deal with criminal cases. It is not, however, evident to me, upon the face of the Criminal Procedure Code, that the powers of the High Court under section 491 might not, apart from any special rule made under the Letters Patent or any directions given by the Chief Justice, competently be discharged by a single Judge. This Bench is in no way a court of appeal from the learned Judge exercising the Ordinary Original Criminal Jurisdiction and grave inconvenience would arise if the same High Court should make an order for arrest and also an order for release upon divergent views upon a question of jurisdiction. If this be possible, so far as the Statute is concerned, it would be possible for a single Judge to make an order overriding and nullifying an order of a Division Bench. A Judge or a Bench which exercises powers under section 491 has no claim to any particular precedence so as to require that the Sheriff should execute no order made by another Judge or Bench inconsistent therewith. It would introduce an incurable confusion into practice and theory, if it were laid down that a considered judgment of the High Court upon a question of its jurisdiction could be challenged before the same High Court under section 491. In my judgment, the circumstance that certain orders of this Court in its Ordinary Original Criminal Jurisdiction are not appealable does not affect this matter. It appears to me that a case such as the present should be viewed on the principle that it would be a good return to a writ in the nature of *habeas corpus* to show that the applicant during his trial at Sessions was being detained under an order of this High Court, which has not been set aside or varied. These considerations do not apply to orders made by Courts other than the High Court.

It is sufficient for purposes of the present case to say that it seems to me to be wrong that this Bench

should think fit under section 491 to retry for itself the question which has already been determined by this Court in its Ordinary Original Criminal Jurisdiction or to pass an order overriding an order already made by this High Court.

In this view, the Rule will be discharged.

RANKIN C.J.

GHOSE J. I agree.

S. M. *Rule discharged.*

INCOME-TAX REFERENCE.

Before Rankin C. J., C. C. Ghose and Buckland JJ.

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March 26.

HARMUKHRAI DULICHAND, *In re.**

Income-tax—Assessment—Combined notice under ss. 23 (2) and 22 (4) of Income-tax Act, 1922, if illegal—Notice under s. 22 (4), if may be issued after return has been filed—Persons deliberately making default in producing accounts, if may complain of assessment as defaulter—Income-tax Act (XI of 1922), ss. 22 (4), 23 (2), 23 (4).

There is nothing illegal in the issue of a combined notice on the assessee under sections 23 (2) and 22 (4) of the Income-tax Act, 1922.

In the Matter of Ramkissen Das Bagri (1) and *In the Matter of Chandra Sen Jaini Vaid, Etawah* (2), followed.

If an assessee has made a return in compliance with a notice under section 22 (2) and thereafter a notice has been served upon him under section 23 (2) and also a notice under section 22 (4) and the assessee has complied with the terms of the notice under section 23 (2) by producing the evidence upon which he relies, but has failed to comply with the notice under section 22 (4) to produce account books, the Income-tax Officer is entitled to make an assessment under section 23 (4), for failure to comply with the notice under section 22 (4). He is not bound to proceed under section 23 (3).

The power to call for books and documents under section 22 (4) is not limited to the period prior to the filing of the Income-tax return.

Brij Raj Ranglal v. *Commissioner of Income Tax* (3), dissented from.

Duni Chand—Dhani Ram v. *The Commissioner of Income-tax* (4) and *Nirmal Kumar Singh Nowlaksha* v. *The Secretary of State for India in Council* (5), referred to.

* Reference under section 66 (2) of the Indian Income-tax Act.

(1) (1927) Decided by Rankin C. J. C. C. Ghose and Buckland J.J. on 18th Jan.

(2) (1928) 26 A. L. J. 340.

(3) (1926) 8 P. L. T. 686.

(4) (1926) I. L. R. 7 Lah. 201.

(5) (1925) 29 C. W. N. 591.