APPELLATE CRIMINAL.

Before Cunliffe and Henderson JJ.

1936

Aug. 3.

BABU LAL CHOKHANI

v.

EMPEROR.*

Bail—Stay or bail, if can be granted by the High Court after the disposal of appeal—Code of Criminal Procedure (Act V of 1898), s. 561A.

After the disposal of a criminal appeal by the High Court, it becomes *functus officio* and has no *seisin* of the case in any way. Before any leave to appeal is granted by the Judicial Committee, the High Court cannot grant bail to the accused.

Emperor v. *Ram Sarup* (1) and *Queen-Empress* v. *Subrahmania Ayyar* (2) distinguished.

Tulsi Telini v. *Emperor* (3) followed.

CRIMINAL REVISION.

The material facts and arguments appear from the judgment.

Noad and *Sateendra Nath Mukherji* for the petitioner.

Page for the Crown.

Cur. adv. vult.

CUNLIFFE J. We now propose to give our reasons for rejecting the petition made to us last Monday on behalf of one Babu Lal Chokhani. The petitioner, it appears, together with a number of other persons, was put on his trial before a Magistrate for offences under the Electricity Act and also for conspiracy. A number of convictions resulted, including the petitioner's. Then a visit was made to the Court of appeal with the result that, so far as the petitioner was concerned, his conviction for conspiracy was set aside, but the Court preserved his

*Criminal Miscellaneous Case, No. 95 of 1936, against the order of S. K. Sinha, Chief Presidency Magistrate of Calcutta, dated July 17, 1936.

(1) (1926) I. L. R. 49 All. 247. (2) (1900) I. L. R. 24 Mad. 16
(3) (1923) I. L. R. 50 Cal. 585.

conviction for theft under the Electricity Act. On that conviction he was sentenced to undergo one year's rigorous imprisonment.

As I understand it, the Court of appeal dealt also with the cases of his co-accused; and I believe these persons are now undergoing their punishment in jail.

The petitioner then approached us for the purpose of obtaining an extension of the time within which he could surrender to his bail before the Chief Presidency Magistrate. He had approached the Magistrate already, who allowed him the concession of not surrendering until, I think I am right in saying, the 29th of the last month, but beyond that the Magistrate was not prepared to go.

The reason that the petitioner asked us to exercise the discretion of the Court in his favour was that he had instructed his solicitors in England to place a petition before the Judicial Committee of the Privy Council with regard to an appeal before their Lordships. He mainly relied upon a case decided comparatively recently by a Bench of the High Court of Allahabad. That was the decision of Sulaiman and Banerji JJ. in the case of *Emperor* v. *Ram Sarup* (1). The learned Judges there decided that they had inherent jurisdiction to stay the execution of their own order when the ends of justice so required it and they could admit to bail a person whose appeal had been admitted by the Privy Council. The judgments of the Court showed that they relied upon the provisions of a new section in the Code of Criminal Procedure, s. 561A, which deals with the preservation of the inherent power of the High Court to make orders which may prevent the abuse of the process of the Court and so on. It is to be noted that the facts in that case were not analogous to the facts before us now, because in the

(1) (1926) I. L. R. 49 All. 247

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course of their judgment the learned Judges made this observation :—

"Before surrendering and before any appeal to their Lordships of the "Privy Council was actually filed, the accused applied to this Court for bail "on the ground that they had sent instructions to a solicitor in England for "lodging a petition for Special Leave." [Then follow the important words.] "The High Court naturally refused to entertain the application so long as "the accused had not surrendered. After information had been received "that they had surrendered, the Bench" (*i.e.*, the earlier Bench of the Allahabad High Court which dealt with the matter) "dismissed the application, "but 'without prejudice to the right to bring another application in the " 'event of Special Leave being granted by the Privy Council' "

It was presumably on the second attempt of the petitioner there that the learned Judges considered the exercise of their inherent power.

Reliance was also placed upon a short decision by a Bench of the Madras High Court in the case of *Queen-Empress* v. *Subrahmania Ayyar* (1). That was a case, again, in which leave had already been granted by the Judicial Committee and the Madras Court allowed bail in a substantial form with two sureties in two substantial amounts. So it will be seen that the facts there were not analogous with the facts before us at the present time.

There is, however, a decision of a Bench of this High Court which dealt with a petition based on facts very similar to the petition before us now. That was the case of *Tulsi Telini* v. *Emperor* (2), decided by the late Chief Justice of this Court, Sir Lancelot Sanderson, sitting with Richardson J. There, as I understand their judgment, the Court held that between the time of an appellate Court dealing finally as far as this province is concerned, with a criminal matter, and the time when a successful approach has been made to the Privy Council, the Court in matters of bail is *functus officio*. Reference was made to *Subrahmania Ayyar's* case (1). It was distinguished and in his judgment Richardson J. said :—

So far as the present case is concerned, this Court is *functus officio* : it has no *seisin* of the case in any way : the case cannot again be brought before this Court for the purpose of leave being given to appeal.

(1) (1900) I. L. R. 24 Mad. 161. (2) (1923) I. L. R. 50 Cal. 585.

It was also held that in the circumstances such as this and in circumstances such as the Court was considering there, it was no question of the powers under cl. 41 of the Letters Patent being successfully invoked.

To my mind, the decision of this Court is binding on us. Nor do I think it is irreconcilable with either of the cases on which reliance was placed by the petitioner. In both the Madras and Allahabad cases, a further stage of a definite nature had been reached in the proceedings by the successful petition to the Privy Council to hear the petitioner's appeal; and as I apprehend, what might well have been decided in this Court in the circumstances, that the further stage had been reached by the acceptance on the part of the Judicial Committee of the appeal, the powers of this Court in regard to bail would be revived and fresh *seisin* of the case with regard to the question of bail could be considered.

After we had the benefit of Mr. Carden Noad's argument, we asked whether the Crown was represented and interested in this question of bail: whereupon we were told by Mr. Page that he represented the Crown and we proceeded to hear him shortly both on merits and on the law. He argued with emphasis that there were no merits in the appeal and having regard to the leading decision in In re *Abraham Mallory Dillet* (1) the chance of a successful approach in such circumstances to the Privy Council was a very remote one.

It may be of interest to say that shortly after we had given our decision in regard to the rejection of this application the Registrar of this Court was informed officially that a suspension order had been issued by the Local Government in reference to this matter. I believe it was a temporary suspension order, lasting until such time as the actual petition for an order of permanent protection *pendente lite* could be considered.

(1) (1887) 12 App. Cas. 459

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It is sometimes said in certain quarters that this Court has become hostile to the directions and orders of the Local Government. I desire to say that nothing is further from the truth. This Court is always anxious to co-operate with the Local Government, if it can do so according to the ordinary rules of law and procedure and bearing in mind its constitutional duty to protect the subject when requiring its protection. It is, in my opinion, only when Government speaks with two voices that any trouble arises. I think I have already noted that counsel for the Crown,—counsel of great experience,—publicly urged in this Court that there were no merits in this application whatever, and that the petitioner's chance of a successful approach to the Judicial Committee was very problematical. It is a difficult position to understand, having regard to the fact that the same official of Government who instructed the learned counsel for the Crown in this Court to argue in this way who also shortly afterwards issued this executive protection order in favour of the petitioner. The two attitudes cannot be properly reconciled.

It is obviously much in favour of a petitioning convicted criminal that he should have the benefit of a protection order such as this to carry him right through until the time the Privy Council decided to admit this appeal. There is, of course, attached to such an order no unpleasant requirements, such as the signing of a bail bond or the calling upon sureties in substantial amounts to be responsible for his necessary appearance in Court. I should imagine that such an order also leaves open a much larger door to the question which sometimes arises of the personal evasion by a convicted criminal of the sentence imposed on him.

I only make these observations in what I regard as the public interest.

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HENDERSON J. In rejecting this application we indicated that we would give our reasons in writing later. The petitioner was convicted of certain offences by the learned Chief Presidency Magistrate. He appealed to this Court. The appeal, which was heard by my Lord the Chief Justice and Costello J., was only partially successful and he was eventually directed to surrender to his bail and serve out a certain term of imprisonment.

The petition before us was really under two heads. In the first place we were asked to interfere in revision with an order of the Chief Presidency Magistrate refusing to extend the time for the petitioner to surrender in order that he might be able to apply for leave to appeal to the Judicial Committee of the Privy Council. It was conceded by Mr. Noad that there is no specific provision of the Code of Criminal Procedure which empowers a Magistrate to make such an order and we attach no importance to the fact that similar orders appear to have been made in the past. It is clearly the duty of the Magistrate to see that the orders of this Court are carried out and not to assist convicted persons in the evasion of them. It is impossible for us, sitting here in revision, to direct the Magistrate to pass what would be a most improper order.

Then in the second place we were asked to make an order for bail ourselves or to allow the petitioner an extension of time to surrender.

Now the case of *Tulsi Telini* v. *Emperor* (1) is a direct authority of this Court for the proposition that we have no jurisdiction to grant bail in a case of this kind. I need only say that I respectfully agree with that decision.

It was, however, contended by Mr. Noad that the law has been altered by the enactment of s. 561A of the Code of Criminal Procedure and in support of his argument he relied on a decision of the High Court of Allahabad, *Emperor* v. *Ram Sarup* (2).

(1) (1923) I. L. R. 50 Cal. 585. (2) (1926) I. L. R. 49 All. 247.

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As the application for bail was rejected the decision is not a direct authority. The opinion of the learned Judges was based not upon the precise terms of the new section, but on the inherent jurisdiction of the Court, which that section purports to preserve. In my opinion, it would be incorrect to interpret s. 561A of the Code of Criminal Procedure as having any reference to bail, a matter which is specifically provided for by the Code itself.

Finally, we were asked to extend the time for the petitioner to surrender under the power preserved to us by s. 561A of the Code of Criminal Procedure. As at present advised I should not be prepared to say that we have no jurisdiction to do so, inasmuch as it is a matter outside the specific provisions of the Code. But I am strongly of opinion that no case has been made out for our interference on the merits. Such a direction would clearly not give effect to any order passed under the Code; on the other hand it would merely stultify an order of this Court. Nor would it prevent the abuse of the process of any Court. The only point which remains is to consider whether it would secure the ends of justice. In my opinion it would not. It is only when leave to appeal has actually been granted that any question of granting bail, either directly or indirectly, arises. It was for that very reason that the learned Judges of the Allahabad High Court rejected the petition which had been made to them.

Application rejected.

A. C. R. C.