APPELLATE CRIMINAL.

Before Mr. Justice Ramesam.

TURKA HUSSAIN SAHEB AND 3 OTHERS (ACCUSED IN CAL. CASE NO. 137 OF 1924 ON THE FILE OF THE COURT OF THE STATIONARY SUB-MAGISTRATE, PATTIKONDA).* 1924, August 15.

Criminal appeal—Disposal of—Criminal Procedure Code, sec. 421—Posting of appeals, practice—Practitioner not prepared to argue the appeal when presenting it—Whether guilty of professional misconduct.

A criminal appeal should not be heard at the time of presenting the papers, even for the purpose of dismissal under section 421 of the Code of Criminal Procedure (Act V of 1898). There must be a special posting of the appeal, after a reasonable time, for the purpose of hearing under section 421.

An appeal raising questions of fact ought not to be disposed of under section 421 without the original records being called for from the lower Court.

A pleader who has drafted the grounds of appeal, but is not prepared to argue it at the time of presenting the appeal, is not guilty of professional misconduct.

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by R. GOPALA RAO, Sessions Judge of Kurnool division in his letter, dated 25th July 1924.

The accused were convicted under section 297 of the Indian Penal Code by the Sub-Magistrate of Pattikonda. They preferred an appeal to the Subdivisional Magistrate of Dhone who directed their pleader to argue the appeal immediately on its presentation. The pleader asked for two days' time to prepare his arguments, but the request was not granted and the appeal was dismissed. Against the order of dismissal a revision petition under section 435 of the Code of Criminal Procedure was presented to the Sessions Judge of Kurnool

* Criminal Revision Case No. 520 of 1924.

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who referred the case under section 438 to the High Court for its orders and stated in the course of his letter of reference—

"3. The Magistrate, to whom the affidavit filed along with the revision petition was sent for remarks, admits that he asked the vakil to argue the appeal at once when the appeal petition was presented to him, as the same showed that the vakil was fully prepared. He makes some other observations in his reply which show that he did not fully realize his responsibility as an Appellate Court and one observation especially does not appear to me to be proper, and that is 'after preparing the appeal petition, if a vakil says he is not ready with the case, I should consider his conduct quite unprofessional.' There may be some justification for this remark only if sufficient opportunity is given to a vakil to argue the appeal and he is yet unready, but not otherwise.

"4. Now, the petitioner's vakil urges that his client is entitled to a remand of the appeal for its being regularly heard on the strength of the mere ground that he was not given sufficient opportunity to prepare himself to support the appeal, and that, in the circumstances stated by the Magistrate, he had no power to summarily dismiss the appeal under section 421, Criminal Procedure Code. In support of this position, he has quoted two rulings, namely, *Rangacharlu* v. *Emperor*(1), and *Ramtohal Dusadh* v. *Emperor*(2). The latter ruling laid down that a pleader for an appellant should not be called upon, immediately on the filing of an appeal, to support it, but should be afforded reasonable opportunity of being heard even when the Appellate Court does not want to admit the appeal at once and wants to hear the appellant before deciding to admit the same under section 421, Criminal Procedure Code. The facts of that case appear to have been similar to those here, for the ruling states 'here the very moment that a petition was filed the pleader was called to support the appeal on any or of all of the grounds upon which it was based. We do not think that this is a reasonable opportunity of being heard.'

The Judges who decided this case were of opinion that the same sort of opportunity as to time should be given to the appellant's pleader as is usually given to the Public Prosecutor, if it is thought necessary to serve him with notice before deciding the appeal. In *Rangacharlu* v. *Emperor*(1), the appellant

(1) (1906) I.L.R., 29 Mad., 236. (2) (1909) I.L.R., 36 Calc., 385.

presented the appeal in person though it had been prepared and signed by a pleader for him, and the Madras High Court held that it should not have been summarily rejected under section 421, Criminal Procedure Code, without giving an opportunity to the pleader to support the appeal and I venture to think that the principle on which both the rulings are based is the same, and that is that before dismissing an appeal under section 421, Criminal Procedure Code, the appellant, or if he has engaged a pleader that pleader, must be given a fair opportunity of being heard. *Rangacharlu* v. *Emperor*(1), has further decided that if the appeal grounds impeach the credit of the witnesses on which the conviction is based, the appeal should not be summarily dismissed under section 421, without calling for records of the case from the Original Court. The appeal grounds Nos. 2 and 4 clearly show that this case falls under the above description. I am therefore of opinion that in the interests of justice the Subdivisional First-class Magistrate, Dhone, should be directed to hear the appeal anew after giving a fair opportunity to the petitioner's pleader to support the grounds of appeal with reference to the merits and case-law."

JUDGMENT.

I entirely agree with the remarks of the Sessions Judge in his letter of reference. The decisions mentioned by him, viz., *Ramtohal Dusadh* v. *Emperor*(2) and *Rangacharlu* v. *Emperor*(1), both lay down that a criminal appeal should not be heard at the time of the presentation of the papers, even for the purpose of dismissal under section 421. The posting for the purpose of hearing under section 421 must be a special posting after a reasonable time not less than a week. *Ramtohal Dusadh* v. *Emperor*(2). This is the practice in the High Court and ought to be the practice in the mufussal wherever it is not.

I may also point out that the view of the learned Subdivisional Magistrate, viz., that a pleader who has looked into the papers of a case for the purpose of

(1) (1905) I.L.R., 29 Mad., 236. (2) (1909) I.L.R., 36 Calc., 385.

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drafting grounds of appeal is guilty of professional misconduct if he is not prepared to argue the appeal at the time of presentation of the appeal papers is not correct. It is well known that a memorandum of appeal containing all possible grounds (some of which may be ultimately untenable) can be drafted by a mere perusal of the judgment and without the use of the depositions, whereas for arguing the questions of fact, the depositions have to be carefully studied.

In *Rangacharlu* v. *Emperor*(1), it is pointed out that, if questions of fact are argued in the appeal, the appeal ought not to be disposed of even under section 421 without sending for the original records of the Court below containing the depositions. I agree with this.

The result is, the dismissal of the appeal by the Subdivisional Magistrate is set aside and the appeal is remanded to him for rehearing and disposal according to law.

D.A.R.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

1924, October 13.

APPICHI GOUNDAN, OF UNSOUND MIND, REPRESENTED BY HIS MOTHER PONGI AMMAL (PETITIONER),

v.

KUTTIYAMMAL (RESPONDENT.)*

Criminal Procedure Code—Sec. 488—Maintenance claim—Counter-petitioner's plea of insanity—Procedure.

When maintenance under section 488 of the Code of Criminal Procedure (Act V of 1898) is claimed and the plea of insanity is set up on behalf of the counter-petitioner, the Magistrate must hold a judicial enquiry into his sanity and put him, if necessary, under medical observation. If he is found insane

(1) (1905) I.L.R., 29 Mad., 236.

* Criminal Revision Case No. 269 of 1924.