RAJITAGIRI-PATHI *v.* PEDAKOTAYYA. —— CURGENVEN J.

We must accordingly differ from the Court below, and hold that on the materials at present available, i.e. the pleadings, the suit is not shown to be barred. It will of course be open to the defendants to show that the terms of section 112 with regard to personal service were complied with or that for any other reason appearing from the pleadings the suit is barred. The appeal is allowed, the decree set aside and the suit remanded for further trial and disposal according to law. Costs in this Court will abide the result. The appellant will be entitled to a refund of the court-fee on the memorandum of appeal.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Ramesam and Mr. Justice Curgenven.

1933, May 30.

In re KAVANNA NAGUTHA MUHAMMED NAINA MARIKAYAR (ACCUSED), PETITIONER.*

Fugitive Offenders Act of 1881 (44 *and* 45 *Vic. c.* 69), *ss.* 14 *and* 19—*Order refusing extradition—Order under ss.* 14 *or* 19—*Appeal to High Court from—Competency of—Remand of case for reception of evidence in—Power of—Code of Criminal Procedure* (*Act V of* 1898), *sec.* 491—*Person detained under order of High Court—Application by, for writ of* Habeas Corpus—*If lies to a Bench of same Court.*

A complaint was filed before the Police Magistrate of Singapore against petitioner who was subsequently arrested in British India on a warrant issued by the Police Magistrate to the District Superintendent of Police of South Arcot. Petitioner was brought before the District Magistrate under sec. 13 of the Fugitive Offenders Act, 1881, for extradition, which was

* Criminal Miscellaneous Petition No. 325 of 1933.

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refused ostensibly under section 14. On appeal to the High Court, the District Magistrate was directed to take fresh evidence before passing final orders under section 14. The District Magistrate after further enquiry directed extradition of the petitioner. An appeal to the High Court was dismissed. On an application under section 491 of the Criminal Procedure Code (Act V of 1898) for the issue of a writ of *Habeas Corpus*,

Held, that an appeal lay to the High Court against the order of the District Magistrate refusing to order the extradition of the petitioner, and that, in disposing of the appeal, the High Court was competent to remand the case for the reception of evidence.

Per CURGENVEN J.—*Quære* whether, when a person has been detained under an order of a High Court, an application under section 491 of the Criminal Procedure Code for the issue of a writ of *Habeas Corpus* will lie to a Bench of the same Court.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *Habeas Corpus* to the District Magistrate of South Arcot directing him to release the petitioner therein forthwith from the custody of his bail and to set him at liberty.

K. S. Jayarama Ayyar and *S. K. Ahmed Meeran* for petitioner.

A. Narasimha Ayyar for *Public Prosecutor* (*L. H. Bewes*) for the Crown.

M. A. T. Coelho and *D. Israel* for the complainant.

Cur. adv. vult.

ORDER.

RAMESAM J.

RAMESAM J.—The facts so far as they are necessary for this petition are as follows. A complaint was filed before the Police Magistrate of Singapore against the petitioner before us on 17th July 1931 charging him with criminal misappropriation. The petitioner returned to British India

about the middle of 1931. The Police Magistrate issued a warrant for the arrest of the petitioner to the District Superintendent of Police of South Arcot. The warrant was endorsed by the District Magistrate and the petitioner was arrested under the warrant and brought before the District Magistrate under section 13 of the Fugitive Offenders Act. Mr. Boulton, the District Magistrate of South Arcot, was of opinion that he was not bound to comply with all applications for extradition. He thought his discretion in dealing with the matter was not limited to the particular circumstances mentioned in section 19 and he therefore refused to order the extradition of the petitioner. There was an appeal to the High Court which came on before WALLACE J. No objection was taken before WALLACE J. that no appeal lay to the High Court on the ground that the order was under section 14 and not under section 19. WALLACE J. disagreed with Mr. Boulton. He thought that all the grounds on which a District Magistrate may refuse to order extradition are contained in section 19 and he directed the District Magistrate to take fresh evidence before making final orders under section 14, and dispose of the matter according to law. The new District Magistrate after further inquiry directed the extradition of the petitioner. There was an appeal to the High Court and the appeal was dismissed by our brother BURN J. The present application is filed under section 491 for the issue of a writ of *Habeas Corpus*. The matter accordingly comes before us.

Mr. Jayarama Ayyar, the learned Advocate who appeared for the petitioner, first contended

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that there is no appeal under the Fugitive Offenders Act against an order under section 14 and that the judgment of WALLACE J. was therefore *ultra vires* and must be regarded as a nullity. I have already pointed out that the objection was not taken before WALLACE J. It is true that mere consent does not confer jurisdiction and in a case in which the matter is perfectly plain it may be that the order of a Court acting without jurisdiction must be regarded as a nullity. But the matter before us is not such a perfectly plain matter. Even conceding for the sake of argument that an order under section 14 is a totally different order from one under section 19 and that the operations of the two sections are exclusive, it is not very clear that the appellate jurisdiction of the High Court is excluded. It is possible to argue that the High Court as a superior criminal Court is competent to act either under section 107 of the Charter Act or in some other way. But apart from this consideration it seems to me perfectly plain that the scheme of the Act shows that sections 14 and 19 cannot be separated into two rigidly watertight compartments. Sections 14 to 18 of the Act enumerate the various instances where extradition warrants may be issued. Section 14 relates to the case of an accused ; section 16 provides for a provisional warrant pending the arrival of the warrant issued by the magisterial authority in the first British Possession ; section 17 relates to a case where the warrant has not been carried out for a month. Section 18 provides for the case where the prisoner after being returned was not prosecuted. Having enumerated these various cases of special powers under the Act,

section 19 deals with the discretion which the Magistrate in the second British Possession has in cases where the return of the prisoner is sought or ordered under the Act. The case where the return is ordered obviously relates to the case of a later stage than section 14, but the case where the return of the prisoner is sought relates to a case under section 14 so that it looks as if one part of section 19 and section 14 overlap and section 19 deals with the discretion which the Magistrate dealing with the matter under section 14 has. So regarded, it cannot be said that an order under section 14 refusing to return the prisoner is not an order under section 19. It is true that Mr. Boulton on his interpretation of the sections thought that he was acting under section 14 only and not exercising the discretion with reference to section 19. But if his interpretation of the sections is not correct, and on this matter I agree with WALLACE J., every order under section 14 relating to a prisoner whose return is sought is merely an order under section 19 and in my opinion an appeal lay to the High Court.

The second point raised by Mr. Jayarama Ayyar is that, assuming an appeal lay, the High Court had no jurisdiction to order the taking of further evidence as the Act does not provide for the superior Court directing the taking of further evidence. Now the Act does not say anything about the powers which the appellate Court may exercise. It looks therefore as if the Act is not complete in itself; and one would therefore infer that what the superior Court should do is left by the Legislature to the law of the particular British Possession relating to appeals. Obviously

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and in such cases a direction for further inquiry may be a consequential or incidental order. I am therefore inclined to agree with the decision of the Full Bench. But the whole of this discussion merely shows that there is no such general principle as that an appellate Court has no inherent power to direct a further inquiry. The remarks of Lord ALVERSTONE C.J. in *Rex* v. *Governor of Brixton Prison. Percival, Ex parte*(1),

> "I have felt very grave doubt whether, . . . we ought not to send the case back to the magistrate, so that he might allow further evidence to be given as to the law of Victoria, or whether we might ourselves have required that evidence to be given to us; . . . "

and similar remarks of DARLING J. at page 708:

> " . . . without doing that which I am quite clear we could do, viz., either send it back to the magistrate and point out to him the defect in the proceedings . . . and allow him to have the prosecution reopened and evidence given, or else require for our own information an affidavit shewing what the law of Victoria applicable to this case is."

confirm my opinion. I therefore think that the order of WALLACE J. is perfectly right and is not vitiated even by an irregularity, much less by want of jurisdiction.

The only other point suggested to us is that the warrant exhausted itself when the petitioner was first brought before Mr. Boulton. When he directed the return of the warrant the High Court stayed the operation of that order and stayed the return of the warrant to Singapore. But apart from that, when the order of Mr. Boulton was set aside, all that happened from the time his order was passed up to the time the case went back before Mr. Vellodi must be regarded

(1) [1907] 1 K.B. 696, 707.

as wiped out and non-existent; and when Mr. Vellodi came to a different conclusion the warrant has got to be executed. In my opinion there is nothing in this point.

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The petition must therefore be dismissed.

CURGENVEN J.

CURGENVEN J.—I agree with my learned brother that this application must fail. The question whether, when a person has been detained under an order of a High Court, an application of this nature will lie to a Bench of the same Court—amounting as it would virtually to an application to revise that order on the ground of lack of jurisdiction—has not been argued and is certainly not a self-evident proposition. But assuming this point to be found in the petitioner's favour, I agree that the order of WALLACE J. has not been shown to have been passed without jurisdiction. On the contrary, I think the learned Judge was right in holding that an appeal lay from Mr. Boulton's order refusing to order extradition. Section 14 of the Fugitive Offenders Act requires the Magistrate to satisfy himself that the warrant is in order and that the prisoner is the person named or described in it. If he is so satisfied, then, so far as the provisions of that section go, he is to order his return to the British Possession in which the warrant was issued. If he is not so satisfied, then no doubt it is open to him to refuse to make an order, and it may be that no appeal would lie from such refusal. The section contemplates only the matters of form adverted to in it, and not any question of the merits of the application, and in invoking its provisions as affording a means to support a decision upon the merits I think that

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the learned District Magistrate exercised a power which the section does not confer. Even if the section stood alone the mere use of the word "may" would not necessarily confer that power. But in section 19, which must be read with it in order to possess ourselves of a full statement of the Magistrate's powers in dealing with a warrant, we find a specific enumeration of the circumstances in which, upon the merits of the case, an order of discharge may be made. It may be made if it appears that

> "by reason of the trivial nature of the case, or by reason of the application for the return of such prisoner not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to return the prisoner either at all or until the expiration of a certain period."

Now I think it is clear that, where the Legislature has adopted the course of defining, with some particularity, the circumstances in which extradition may be refused, it is not open to a Court to hold that, merely because the instruction in section 14 is permissive and not mandatory in form, it may ignore the terms of the later section and exercise a discretion not conferred by them. It would be still more objectionable if an order so passed were, as is contended before us, not to be subject to appeal, while an order passed on any of the grounds mentioned in section 19 is appealable. I am inclined to think that the order of the District Magistrate, although ostensibly passed under section 14, could in terms be brought under section 19, because he holds that the case is not one where the interests of justice

require the rendition of the accused person. But whether that be so or not, I am clear that section 19 is the only provision which enables a Magistrate to adjudicate upon the merits of the application, and, that being so, Mr. Boulton's order must be taken as having been passed under that section. It was therefore appealable.

The only other point deserving consideration is whether, in disposing of the appeal, this Court was competent to remand the case for the reception of evidence. As my learned brother has pointed out, the Fugitive Offenders Act does not define the powers which an appellate Court may exercise in this behalf, and the only reasonable inference is that it may act in accordance with the normal procedure by which it is governed in the exercise of its appellate criminal jurisdiction. It is hardly to be expected that the language of the Criminal Procedure Code will be found adapted to a case of this nature *verbatim et literim*. It is enough, I think, to point out that, under the provisions of section 423, (*a*) in an appeal from an acquittal an order may be made directing further inquiry, and (*b*) in an appeal from a conviction an order may be made directing a retrial. The section further empowers the appellate Court, in language markedly wide, to "make any amendment or any consequential or incidental order that may be just or proper". Furthermore, section 428 empowers an appellate Court to order the reception of further evidence, either by itself or by another Court. In view of these provisions I think it lies somewhat heavily upon the party asserting it to establish that the normal powers of an appellate Court do not include the power to

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remand a case for further inquiry; and this is the more so because in cases such as the present it may happen that such a course alone would avail to reach a right conclusion. My learned brother has discussed the case law relating to sections 195 and 476 of the Code of Criminal Procedure. In view of the recent Full Bench decision in *Janardana Rao* v. *Lakshmi Narasamma*(1) they do not help the petitioner. No other authority for the position pressed upon us has been cited. I conclude that the order of remand was passed with jurisdiction, and confers validity upon the subsequent orders passed in this case.

BY COURT:—The petitioner will present himself before the Police Magistrate of Singapore on or before 20th June.

K.W.R.

(1) (1933) I.L.R. 57 Mad. 177 (F.B.).