

failed in this duty, and had failed further to make ordinary provision for the expeditious extinguishing of any fire that might break out in the goods shed.

Whether the railway company has been negligent in that it had not made reasonable provision for the protection of the plaintiffs' bales of hemp, or for the extinguishing of any fire that might occur on its premises, is really a "jury question". The hemp was stored within 30 or 40 feet of the running line, no shield was provided to prevent the sparks from passing engines alighting on combustible materials stored in the shed, and so far as appliances for extinguishing fires are concerned, all that seems to have been provided was half a dozen iron water-buckets, which were empty at the time when the plaintiffs' bales caught fire. In these circumstances we have no hesitation in concluding that the railway company was grossly negligent in failing to make adequate and reasonable provision for the protection of the goods which had been delivered to it by the plaintiffs and accepted by them for transportation to Calcutta. The railway company in the circumstances are liable as bailees under section 151 of the Contract Act.

In the result the appeal is dismissed with costs.

## REVISIONAL CRIMINAL

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bennet*

EMPEROR *v.* MASURIA\*

*Criminal Procedure Code, sections 118, 120, 426, 498—Security for good behaviour—Imprisonment for failure to furnish security—Release on bail pending appeal—Power to admit to bail—Time of such release to be excluded from the period of the order requiring security and directing imprisonment in default.*

A person who has been ordered to furnish security to be of good behaviour for one year, and on failure to do so has been

1935

SECRETARY  
OF STATE  
FOR INDIA  
*v.*  
SHRO-  
BHAGWAN  
CHIRANJI-  
LAL

1935  
October, 17

\*Criminal Revision No. 629 of 1935, by the Local Government from an order of T. N. Mulla, Sessions Judge of Allahabad, dated the 8th of April, 1935.

1935

EMPEROR  
v.  
MASURIA

committed to prison, can, on appeal under section 406 of the Criminal Procedure Code to the Sessions Judge, be ordered by him to be released on bail pending the appeal, in exercise of the powers conferred on him by section 498 of the Code. Section 426 can not apply to such a case, as it applies only where an appeal by a person convicted of an offence is pending. But section 498 confers very wide powers to admit to bail any person who is detained in jail, no matter whether he is a convicted person or not, and no matter whether he has appealed from a conviction for an offence or has preferred any other appeal allowed by the Code, and even where there is no appeal pending.

The time during which such a person remains out on bail by order of the Sessions Judge is, if his appeal is ultimately dismissed and he surrenders to his bail, to be excluded, on the analogy of the release on bail of persons convicted of offences, from the term prescribed under the order of the Magistrate who bound him over. During that time he has neither furnished the security which was ordered nor been detained in jail in default as directed by the order; it can not therefore be said that during that period the order of the Magistrate has been carried out and has therefore partially exhausted itself. It is noteworthy that section 120(2) of the Criminal Procedure Code merely fixes the date of the commencement of the term of imprisonment, and does not deal with cases where the term has been interrupted by a subsequent order made by an appellate or revisional court.

The Government Advocate (*Mr. Muhammad Ismail* for the Crown).

The opposite party was not represented.

SULAIMAN, C.J., and BENNET, J.:—This is an application in revision by Government from the order of the Sessions Judge of Allahabad admitting the opposite party to bail, who had been bound over under section 118 of the Code of Criminal Procedure for a period of one year to be of good behaviour, and ordered to undergo imprisonment unless he furnished two reliable sureties.

Two questions are raised in this revision. The first is that the Sessions Judge had no jurisdiction to admit Masuria to bail at all; and the second is that the period

during which Masuria would remain on bail should be excluded from the period of one year for which he has been bound over, if his appeal be dismissed ultimately.

1935  
EMPEROR  
v.  
MASURIA

As regards the first point it was held by a learned Judge of this Court in *Emperor v. Katwaru Rai* (1) that the words "convicted person" in section 426(1) of the Code of Criminal Procedure include persons against whom an order has been passed by a criminal court from which there is an appeal allowed, and accordingly persons bound over under section 107 of the Code of Criminal Procedure to keep the peace and ordered to find security, while appealing to the sessions court, could apply under section 426(1) to be released, and that even if section 426(1) did not apply, the order could be passed under section 423(1)(d). It was further pointed out by one of us in the later case of *Emperor v. Darsu* (2) that a person imprisoned under section 123 of the Code of Criminal Procedure is not strictly speaking a convicted person and that section 426 could therefore be applied by analogy only and that the Sessions Judge would have power under section 498 to release such a person on bail.

The scheme of the Criminal Procedure Code is that part IV deals with "Prevention of offences" and security that has to be taken for keeping the peace and for being of good behaviour. The persons brought before the court are not accused persons who are charged with any offence, as they have up to that time committed no offence at all. On the contrary part VI deals with "Proceedings in prosecutions" of accused persons who are alleged to have committed certain offences and they have either to be convicted, acquitted or discharged. It seems to us that persons against whom proceedings are taken under chapter VIII are not accused persons, nor can they be called convicted persons when an order is passed against them adversely. That such a distinction exists is shown by the circumstance that separate provisions for appeals

(1) (1932) I.L.R., 54 All., 861.

(2) (1934) I.L.R., 57 All., 264.

1935

EMPEROR  
v.  
MASURIA

are made in part VII. Section 406 allows appeals to a person who has been ordered under section 118 to give security, section 406A to a person aggrieved by an order refusing to accept or rejecting a surety, while section 407 and the following sections allow appeals to persons convicted of offences. The word "convicted" has been used in the Code as meaning "convicted of an offence", and would therefore be inapplicable to the case of persons who are bound over.

There is accordingly difficulty in applying section 426 to such a case. Under that section where an appeal by a "convicted person" is pending, the appellate court may order the execution of the sentence or order to be suspended or the person released on bail or on his own bond. That section applies to all criminal courts and would be applicable where there is an appeal by a convicted person. It would not apply to a person who has been bound over and who has preferred an appeal under section 406 of the Code of Criminal Procedure. On the other hand section 498 which applies to courts of session and the High Court is more general in its scope and empowers such court "in any case, whether there be an appeal on conviction or not", to direct that any person be admitted to bail. The words "in any case" are very comprehensive and would certainly apply to a case where a person has been bound over. The words "whether there be an appeal on conviction or not" are again of very general scope and would cover such a case. The legislature has obviously intended to confer upon the High Court and a court of session very wide powers to admit to bail any person who is detained in jail, no matter whether he is a convicted person or not, and no matter whether he has appealed from a conviction for an offence or has preferred any other appeal allowed by the Code, and even where there is no appeal pending. There is no reason for limiting the scope of the section so as to narrow it down to cases where persons have been convicted of offences and have preferred appeals under section

407 and the following sections. We must, therefore, hold that the learned Sessions Judge had power under section 498 to admit Masuria to bail. But that section of course did not empower him to pass an order under section 426 suspending the execution of the order.

The second question is somewhat difficult. In the case of *Emperor v. Darsu* (1) it was distinctly laid down that quite apart from the provisions of section 426, the general principles of criminal law required that the period during which the applicant was released on bail must be excluded from the period of one year for which he was required to undergo imprisonment failing the giving of security. It was there pointed out that a contrary view would create the anomaly that "in every case in which a person ordered to be imprisoned under section 123 made an appeal, then the period during which he was released on bail would always reduce the period for which he was to be imprisoned". It is noteworthy that section 112 merely fixes a "term" for which the order is to be enforced; that is to say, it fixes a period of time during which the accused must either furnish security or failing such security be detained in prison. It does not necessarily mean that the order should be operative from one particular date till another particular date, no matter whether the accused has been released by an order of an appellate court in the meantime. Similarly section 120(2) merely lays down that the period shall commence on the date of such order unless the Magistrate for special reasons fixes a later date. That merely fixes the commencement of the term and does not deal with cases where the term has been interrupted by a subsequent order made by an appellate court or a revisional court.

There are several classes of cases where a person can be detained in custody although he has not been convicted of an offence, vide section 217(2). In cases where a person has been convicted of an offence

1935

EMPEROR  
v.  
MASURIA

1935  
 EMPEROR  
 v.  
 MASURIA

and the sessions court on appeal admits him to bail, the court may not necessarily pass a separate order suspending the execution of the sentence or pass an order releasing him on bail under section 426. It may simply pass an order under section 498 admitting him to bail. The necessary result of the release on bail is that the person does not serve out his sentence of imprisonment during the period that he is released on bail. When therefore his appeal is dismissed and he surrenders to his bail, he must serve out the remaining portion of his sentence so as to complete the full period of imprisonment passed against him. It seems to us that the same principle should apply to cases where a person has been bound over for a particular period, is released on bail by the Sessions Judge and has to surrender after the dismissal of his appeal. The necessary result of his being allowed to be at large is that he has for that period neither furnished any security as required by the order of the Magistrate nor been detained in jail, but has been set free by the order of the appellate court. It cannot therefore be said that during this period the order of the Magistrate has been carried out and has therefore partially exhausted itself. We think that on the analogy of the release on bail of persons convicted of offences it must follow that the period during which the person bound over is released on bail by an order of the appellate court should be excluded from the term prescribed under the order of the Magistrate who bound him over.

With these observations we dismiss this application.

### REVISIONAL CIVIL

*Before Mr. Justice Iqbal Ahmad*

MANNI GIR (PLAINTIFF) v. AMAR JATI AND ANOTHER  
 (DEFENDANTS)\*

1935  
 October, 21

*Civil Procedure Code, section 52—Legal representative—Decree against assets of deceased debtor in the hands of a legal representative—Other legal representatives, also having*