no criterion for the punishment of the completed offence of attempt to cheat. When he insured his letter at Chapra for the purpose of defrauding the Government the petitioner had proceeded but a little way in the execution of his purpose. The sentence of one year's rigorous imprisonment is by no means excessive, particularly having regard to the fact that it was reduced in the Session Court by reason of " an earnest appeal for leniency."

The application is without merits and I would discharge the rule.

DHAVLE, J.—I agree.

REVISIONAL CRIMINAL.

Before Macpherson and Dhavle, JJ.

CHARAN MAHTO

v.

KING-EMPEROR.*

1929.

May, 6.

Code of Criminal Procedure, 1898 (Act V of 1898), sections 118 and 426(1)—inquiry under Chapter VIII, whether a trial—person called upon to furnish security under section 118, whether deemed to be convicted—section 426(1), whether applies to such person—order releasing on bail pending appeal by such person, whether legal.

A proceeding under Chapter VIII, Code of Criminal Procedure, 1898, dealing with "Security for keeping the Peace and for Good Behaviour " is an inquiry which, under the definition of that term, excludes a " trial ".

*Criminal Miscellaneous Case no. 19 of 1929. From an order of P. N. Bhattacharya, Esq., officiating Additional Sessions Judge of Manbhum-Sambalpur, dated the 30th January, 1929, reversing an order of the District Magistrate of Manbhum, dated the 7th July, 1929.

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A person in respect of whom such inquiry is held is not "deemed" to be an accused, nor, when an order under section 118 is passed against him, to be a convicted person.

Binode Behari Nath v. *Emperor* (1) and *Emperor* v. *Bhagwat Singh* (2), followed.

Ahmad Ali Sardar v. *Emperor* (3), distinguished.

Section 426(*1*), Code of Criminal Procedure, 1898, provides:

"Pending any appeal by a convicted person the appellate court may.....order.....that he be released on bail or on his own bond.

Held, that under section 426 the existence of an appeal by a *convicted person* is a condition precedent to jurisdiction to grant bail, and that, therefore, an order of the District Magistrate, releasing on bail pending appeal a person who has been called upon to give security under section 118 of the Code and who has appealed to him, is without jurisdiction.

Per *Dhavle*, *J.*: When a person in respect of whom an order requiring security under section 118 is made, fails to give security, and is, in consequence thereof, committed to prison, such imprisonment stands on a different footing from a sentence of imprisonment passed on a conviction in respect of an offence.

Markandar Genda v. *King-Emperor* (4), followed.

The facts of this case material to this report are stated in the judgment of Macpherson, J.

S. K. Mitter, for the petitioner.

W. H. Akbari (for Assistant Government Advocate), for the crown.

MACPHERSON, J.—This application in revision is directed against the order of the Additional Sessions Judge of Manbhum-Sambalpur cancelling the order of bail in favour of the petitioners passed by the Deputy Commissioner, who is the District Magistrate of Manbhum.

(1) (1923) I. L. R. 50 Cal. 985. (2) (1924) I. L. R. 48 Cal. 501.
(3) (1923) I. L. R. 50 Cal. 969. (4) (1916) 1 Pat. L. J. 212

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On the 5th July, 1928, a first-class Magistrate directed the petitioners under section 118 of the Code of Criminal Procedure to furnish personal bonds in Rs. 200 and two sureties in Rs. 100 each to be of good behaviour for a period of one year and in default to undergo rigorous imprisonment for that period. Security was not furnished and the petitioners were committed to prison. Against the order they preferred an appeal under section 406 of the Code to the District Magistrate of Manbhum who under the first proviso to that section is the proper court of appeal, and on the 7th July the District Magistrate admitted the appeal and directed the release of the appellants on bail of Rs. 300 with two sureties each pending the hearing of the appeal. Bail was furnished and the appellants were released on the 9th July. Eventually this Court on the 6th November transferred the appeal to the file of the Sessions Judge of Manbhum-Sambalpur who on the 15th January, 1929, transferred it to the Additional Sessions Judge. The Crown moved the learned Additional Sessions Judge to cancel the bail bonds executed by the appellants and on the 30th January the Additional Sessions Judge cancelled them holding that the order granting bail was illegal and without jurisdiction and that as the order could have been cancelled by the District Magistrate, he standing in the place of the District Magistrate, had jurisdiction to cancel it. The petitioners surrendered to their bail and on the 5th March moved a Judge of this Court. The application in revision was admitted by a Division Bench before whom the learned Judge of this Court directed it to be placed because of its importance. The appeal has not yet been heard as the petitioners obtained an order of stay being for some reason more concerned to secure a decision on the question of the powers of the District Magistrate to grant bail than to secure prompt disposal of their appeal.

In support of the application it has been urged, first, that the District Magistrate had ample jurisdiction to release the petitioners on bail; and, secondly, that even if he had not, the Additional Sessions Judge had no jurisdiction to cancel his order.

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Now the provisions relating to appeals are found in Chapter XXXI of the Code of Criminal Procedure. It opens with section 404, which is a general section restricting appeals. There follow three sections 405, 406 and 406A which relate to appeals from orders. Next come provisions in sections 407, 408, 410, 411 relating to "an appeal by a person convicted on a trial" while sections 413 and 414 begin "Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person" in certain cases where the sentence is small and in cases tried summarily, where the sentence does not exceed a fine of Rs. 200. Admittedly the only provision as to bail which could be applicable to the present case is section 426(1). It enacts

> "Pending any appeal by a convicted person the appellate Court may.....order.....that he be released on bail or on his own bond."

In support of the first contention Mr. S. K. Mitra has argued that a person ordered to execute a bond with or without sureties under section 118 must be "deemed" to be 'a convicted person' within the meaning of section 426. The plea is not sound. Part IV of the Code which contains Chapter VIII deals with Prevention of Offences, and Chapter VIII deals with Security for keeping the Peace and for Good Behaviour. A proceeding under that chapter is an inquiry which under the definition of the term excludes a trial. No doubt section 117 applies to such inquiry the procedure prescribed for conducting trials, and the terms and expressions which occur in a trial come to be loosely applied in an inquiry also for the sake of convenience. But actually the person in respect of whom the inquiry is held is not an accused but a quasi-accused, and he is not, as Mr. Mitra urges, "deemed" to be an accused, nor when an order is passed against him "deemed" to be convicted. Indeed the provision so far from rendering the inquiry a trial serves to bring into prominence the fact that it is not a trial. An inquiry is a criminal case but it results in an order, unlike a trial for an offence which results in a conviction or an acquittal. In

Binode Behari Nath v. *Emperor* (1) it was held that a person who was called upon to give security under Chapter VIII is (*1*) not an accused and (*2*) not guilty of any offence as defined in section 4(*o*) of the Indian Penal Code. In *Emperor* v. *Bhagwat Singh* (2) the Allahabad High Court has held that a person bound down under section 107 is not a person convicted of an offence. Even if for certain purposes of procedure a person in respect of whom an inquiry is proceeding, is an accused, he cannot be convicted as he is not accused of an offence. A conviction is the judgment of a legal tribunal adjudging a person guilty of a criminal offence. Under section 426(*1*) the existence of an appeal by a convicted person is a condition precedent to jurisdiction to grant bail. The Code clearly contemplates that there cannot be a conviction unless there has been a trial for an offence and the expression "appeal by a convicted person" in section 426(*1*) means an appeal by a person convicted at such a trial. Whereas in the case of a person against whom an order is made under section 118, there is no offence and no trial, he is not 'a person convicted on a trial' nor is he 'a convicted person.' In short section 426 under which the District Magistrate appears to have granted bail to the petitioners has no application to the circumstances. It is not contended that any other provision of the Code authorised him to do so nor that he had inherent jurisdiction to liberate any person on bail. In my opinion his order was without jurisdiction.

Some reference has been made to section 498 of the Code and to the decision in *Ahmad Ali Sardar* v. *Emperor*(3) which is relied upon. It may indeed be that under that provision a Court of Session is empowered to admit to bail pending the hearing of the reference a person directed under section 118 to give security for two years, whose case has been referred to it under

(1) (1923) I. L. R. 50 Cal. 985. (2) (1924) I. L. R. 48 All. 501.
(3) (1923) I. L. R. 50 Cal. 969.

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section 123(2) of the Code. But the basis of the order would be that in a case under section 123(2) the final order is that of the Sessions Judge, and in the decision cited the learned Judges apparently contemplated that the Sessions Judge was authorised to revise an order passed by the Magistrate under section 118 as affected by section 120(2) in respect of the dates between which the order for security and the imprisonment in default would operate. Whether that view is correct or not, [and it is perhaps open to question whether an order committing to prison a person who has failed to give security required under section 118 is a sentence of imprisonment or the person so committed is sentenced to imprisonment within the meaning of section 426(3)] the present case is clearly distinguishable. Here the bond and security required are for one year and the order requires no confirmation of any superior court or authority but subject to any appeal preferred under section 406 is final. Now section 120 provides that when a person has been ordered under section 118 to furnish security, the period for which security is required shall commence on the date of such order, unless the Magistrate for sufficient reason fixes a later date. The Magistrate did not fix a later date in respect of the petitioners. Section 123(1) enacts that if a person does not furnish such security on or before the date on which the period for which security is to be given commences, he shall be committed to prison until such period expires or until he gives security. The obvious inference is that the legislature did not contemplate that bail should be allowed in such a case or that the appellate Court should alter the dates, so that a person who has been released on bail for a portion of the "period" should be detained in jail beyond the expiry of the "period" for the number of days on which he was on bail. That is to say, the statute does not provide for suspension or abeyance of the period of detention in prison. And that is altogether reasonable: the detention is preventive merely, and on bail the detenu is not prevented from committing offences. In the present instance we have the

curious result that bail with two sureties for Rs. 300 is readily secured whereas two sureties on Rs. 100 for good behaviour are not available. Again the effect of the order granting bail has been to set the petitioners at liberty without security for more than seven months of the period specified in section 118, which, under the provisions of the Code of Criminal Procedure, cannot be excluded in computing the period for which they are to be detained in prison for default in furnishing security. Such a state of affairs could not have been contemplated by the legislature. The first contention cannot prevail.

As to whether the Additional Sessions Judge had jurisdiction to cancel the bail order, there appears to be much to be said for his view that on the transfer of the appeal to him he was in the peculiar circumstances in the same position as the District Magistrate in respect of jurisdiction to cancel the bail-bond on which the appellants had been released and that as the District Magistrate certainly could have cancelled the order for bail on, among other grounds, want of jurisdiction to make it, it was open to the Additional Sessions Judge to do the same. It is, however, not necessary to decide the point in view of the order which we propose to make.

The learned Sessions Judge has moved this Court to retransfer the appeal to the District Magistrate as the file of the Sessions Judge is in heavy arrears, there is no additional Sessions Judge and no prospect of one for some months, there is a new Deputy Commissioner who had no previous concern with the proceedings against the petitioners, and the appeal should be heard without further delay. We accept the reference and transfer, in accordance with the wishes of all concerned, the appeal to the file of the Deputy Commissioner of Manbhum. In the circumstances the question of the legality of the transfer of an appeal governed by the proviso to section 406 of the Session Court need not be considered.

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In the circumstances the order of the Deputy Commissioner granting bail being illegal, we see no ground for interfering in revision with the order cancelling it. The rule is accordingly discharged. The appeal should be heard without further delay.

DHAVLE, J.

DHAVLE, J.—I agree. The Code of Criminal Procedure makes a definite distinction at point after point between persons called on to give security under sections 107 to 110 and persons accused of offences. As was pointed out in *Binode Behari Nath* v. *Emperor* (1) the former are (unlike the latter) nowhere referred to as "accused" persons, and the amendments of 1923 in such sections as section 340 and section 436 only emphasize the distinction. An accused person is "tried", and if he is found "guilty", "sentence" is passed upon him under section 245(*2*), section 258(*2*) or section 306(*2*) as the case may be (unless resort is had to the exceptional provisions of sections 349 and 562). It appears from sections 263(*h*) and 306(*2*), among other sections, that there is no distinction between "convicting" an accused person and finding him guilty. Against the sentence passed, a "person convicted on a trial" may appeal under sections 407, 408, 410 or 411. It will thus be seen how a person who begins as an accused person may come within section 426 in respect of an "appeal by a convicted person." A person against whom security proceedings are taken (unless discharged under section 119) only becomes, in section 120, a "person in respect of whom an order requiring security under section 118 is made", and in section 123, "a person ordered to give security under section 118." He cannot be said to have been "tried" or found "guilty", nor is any "sentence" passed upon him. It is true that in default of security he is to be "committed to prison", but such imprisonment stands on quite a different footing from a sentence of imprisonment passed on a conviction in respect of an offence [See *Markandar Genda* v. *King-Emperor* (2)]. The

(1) (1923) I. L. R. 50 Cal. 985. (2) (1916) 1 Pat. L. J. 212.

Code does not anywhere refer to persons dealt with under section 118 as convicted persons; and section 406 which provides an appeal against an order under section 118 speaks of "any person who has been ordered under section 118 to give security....." This is in sharp contrast to sections 407, 408, 410 and 411 which give an appeal—an appeal from a sentence—to "any person convicted on a trial." Section 426 which is invoked on behalf of the petitioners provides for orders "pending any appeal by a convicted person." Having regard in particular to the fact that this section occurs in the same chapter as sections 406 to 411 with the distinction that they make between persons dealt with under section 118 and persons convicted on trials, I cannot see on what principle it can be held that the legislature gave up the distinction between the two classes of persons for the purposes of section 426. It is true that the section speaks of a "convicted person" instead of a "person convicted on a trial"; but there does not seem to be any real difference between these expressions, and I can see no reason to regard persons dealt with under section 118 as included in the category of "convicted" persons.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

Before Fazl Ali and Chatterji, JJ.

A. H. FORBES

v.

COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.*

1929.

May, 6.

Income-tax Act, 1922 (*Act XI of* 1922), *sections* 8, 10, 12 *and* 24—*interest on securities—deduction for collection charges not allowable—deduction is not "loss."*

*Miscellaneous Judicial Case nor 39 of 1929.