MISCELLANEOUS CRIMINAL.

Before Shadi Lal C. J. and Abdul Qadir J.

1931

May 23.

IN THE MATTER OF THE DETENTION OF THE APPROVER KHAIRATI RAM.

Criminal Miscellaneous No. 71 of 1931.

Criminal Procedure Code, Act V of 1898, section 337—Approver—whether can be ordered to be detained in police custody—Section 541 (1)—operation of—Local Government's Notification under, providing for approvers to be detained in police custody—whether intra vires*—Indian Prisons Act, IX of 1894, sections 3 and 4 and Prisoners Act, III of 1900, section 3—"Criminal prisoner"—Accommodation of—duty of Local Government to provide.*

Held that, though an approver is *particeps criminis*, as soon as a pardon is granted to him with a view to obtaining his evidence, he becomes a witness *qua* the case in which he is to be examined, and continues to assume that role up to the time when his failure to comply with the condition causes a forfeiture of the pardon. During that period he is only a witness, and he cannot be viewed as an accused. Under subsection 3 of section 337 of the Code of Criminal Procedure he is to be detained in custody until the termination of the trial, but there is no warrant either in principle or in law for detaining an approver, as such, in *police* custody. The Law views with disfavour detention in police custody and confines it within narrow limits, under stringent conditions, even in the case of an accused person.

Canada Sugar Refining Company v. *Regina* (1), and *Henderson* v. *Sherborne* (2), relied on.

Held further, that an approver, when his detention is ordered by a Court of law under section 337 (3) of the Code, comes within the category of "criminal prisoner," as defined by section 3 (2) of the Prisons Act, IX of 1894. And section 4 of that Act imposes upon the Local Government the duty

(1) 1898 A. C. 735, 741, per Lord Davey.
(2) (1837) 2 M. and W. 236, 239, per Lord Abinger C. B.

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of providing for prisoners' accommodation in prisons as ordained by that Act. Moreover the officer-in-charge of a prison is enjoined by section 3 of the Prisoners Act, III of 1900, to receive and detain all persons duly committed to his custody by any Court.

And thus, the statute makes ample provisions for the detention of every person committed to custody by a Court of Law.

Held also, that sub-section (1) of section 541 of the Criminal Procedure Code, can come into operation only when there is no other law providing for the custody in question, and that sub-section, moreover, empowers the Local Government to prescribe a *place* for the confinement of the person mentioned therein, and it cannot be invoked for the purpose of prescribing the *custody* in which he is to be kept.

And therefore, a Notification purporting to have been issued under that sub-section by the Local Government directing the confinement of the approvers in that portion of the Lahore Fort which is in the occupation of the police, had been rightly held to be *ultra vires*.

Application under section 491, Criminal Procedure Code, of Khairati Ram (approver) praying that the order passed by the High Court in his absence and without his knowledge may be set aside, and that he be remitted to the police custody in which he was previously detained.

CARDEN-NOAD, Government Advocate and JAWALA PARSHAD, Public Prosecutor, for Petitioner.

JAGAN NATH AGGARWAL, SHAMAIR CHAND, SHAM LAL, AMOLAK RAM KAPUR and AMIN CHAND MEHTA, for Respondents.

The judgment of the Court was delivered by—

SHADI LAL C. J.—This application for a writ of *habeas corpus* has been made by the Government Advocate on behalf of Khairati Ram, who is an ap-

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prover in a criminal case, which is being tried by three Commissioners appointed under section 4 of the Criminal Procedure (Punjab Amendment) Act of 1930. There are altogether five approvers in that case, and the first approver, Indar Pal, during the course of his examination as a witness, complained that he had been subjected to ill-treatment by the police, and induced the Commissioners to remove him from the custody of the Police to jail. A similar request was made by the accused in respect of the custody of the remaining four approvers, but was refused by the Commissioners. Their decision was, however, dissented from by a Division Bench of the High Court, (1), who declared the detention of the approvers in the custody of the police to be illegal, and transferred them to judicial custody.

It is common ground that the approvers were not a party to the case in which the learned Judges of this Court made their pronouncement about the illegality of the police custody, and the applicant, Khairati Ram, challenges the correctness of that judgment. He accordingly alleges that "he is being illegally and improperly detained as a prisoner in the Central Jail, Lahore;" and prays "that the order passed against him in his absence and without his knowledge by this Hon'ble Court may be set aside and that he be remitted to the custody in which he was detained prior to the passing of the said order."

The learned counsel for the accused raises the preliminary objection that the application has been really made, not by Khairati Ram, but by the Crown, who being bound by the previous decision, seeks to have it reviewed by putting forward Khairati Ram as a

(1) See page 604 *supra*.

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dummy. In support of this objection, the learned counsel invites our attention to the unusual procedure adopted in this case that the leading counsel for the Local Government should come forward to condemn as illegal the custody which has been pronounced by the High Court to be perfectly legal, and should ask for a writ of *habeas corpus* on behalf of a private person against a jail officer, who is subordinate to that Government. It is also urged that if the application were dictated by the interests of the approver, one would expect that it should contain a prayer for his release, which is usually done in an application for a writ of *habeas corpus*, and should not insist upon his return to police custody. The learned Government Advocate explains that Khairati Ram, prompted by considerations of personal safety, prefers police custody to his release on bail; and that it was at his own request that the Crown counsel was directed to make the present application.

These rival contentions are not devoid of force, but it is unnecessary to dwell upon them, because, after hearing elaborate arguments upon the important question of law raised by the application, we are of the opinion that it must fail on the merits.

The law relating to the tender of pardon to an accomplice is embodied in section 337 of the Code of Criminal Procedure. The first sub-section of section 337 prescribes the offences in respect of which, and the Courts by which, a pardon may be tendered "with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, the offence." It is enacted by sub-section (2) of that section that every person accepting a tender of pardon shall be examined as a witness in the Court

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of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. We now come to the provision upon which the determination of the question before us depends. Sub-section (3) lays down that "such person, unless he is already on bail, shall be detained in custody until the termination of the trial."

We may clear the ground by stating at the outset that we cannot accede to the argument advanced by Mr. Jagan Nath Aggarwal for the accused that the approver should be regarded as an accused person who can never be kept in police custody after the termination of the investigation. It is true that an approver is a *particeps criminis*, and a culprit should ordinarily be tried for the offence committed by him, but the Crown is not bound to prosecute every offender and the public interests may sometimes demand that a culprit should appear, not in the dock, but in the witness box. For that purpose he may be granted a pardon on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. As soon as a pardon is granted to him with a view to obtaining his evidence, he becomes a witness *qua* the case in which he is to be examined, and continues to assume that role up to the time when his failure to comply with the condition causes a forfeiture of the pardon. During that period he is only a witness, though an infamous witness, and he cannot be viewed as an accused. Indeed, sub-section (2) of section 337 lays it down in express terms that he "shall be examined as a witness;" and it is clear that under the Indian Law an accused person can, in no case, be examined as a witness.

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We must, therefore, hold that the approver's position cannot be assimilated to that of an accused, as long as he has not forfeited the pardon; and he must be regarded as a witness for the purposes of the case in which he has to give evidence. But there is no law which provides that a witness should be detained in police custody. Section 171 declares that no witness on his way to the Court of the Magistrate shall be required to accompany a police officer or shall be subjected to unnecessary restraint or inconvenience, unless he refuses to attend or to execute a bond for his attendance. In that case the only thing which the police officer can do is to forward him in custody to the Magistrate.

Indeed, the law does not authorize a police officer to keep even an accused person in his custody for an indefinite period. In certain circumstances a police officer is authorized to arrest a person without a warrant, but section 61 of the Criminal Procedure Code makes it clear that such person shall not be detained "for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court." When the accused is produced before a Magistrate, the latter is empowered under section 167 to direct the detention of the former "for a term not exceeding fifteen days in the whole." It will be observed that this section comes into operation only if the investigation cannot be completed within the period of twenty-four hours fixed by section 61, and that, if the Magistrate authorizes detention in the custody of the police, he is enjoined to record his reasons for so doing. The

law evidently views with disfavour detention in the custody of the police, and even in the case of an accused person such detention can be allowed only in special cases and for reasons to be stated in writing and not as a matter of course whenever it may be asked for by an investigating police officer. These provisions of the law are most useful and necessary, and they should be strictly complied with by the subordinate Courts.

It is abundantly clear that even in the case of an accused person detention in police custody is confined within the narrowest limits and hedged in by stringent conditions, and that the period of such detention, exclusive of the twenty-four hours prescribed by section 61, cannot exceed 15 days in all, including one or more remands. If the detention by the Police of an accused person for an indefinite period is illegal, where is the law authorizing such detention in the case of a witness? There is no warrant either in principle or in the statute for detaining a witness as such in police custody. The position of an approver-witness differs from that of an ordinary witness only in one respect. He has secured immunity from prosecution by undertaking to give evidence relative to the crime, and some restraint has to be imposed upon his liberty until he has satisfied the condition on which he has obtained the pardon. It is accordingly provided by sub-section (3) of section 337 that, unless he is already on bail, he shall be detained in custody until the termination of the trial. It is, however, contended by the learned Government Advocate that an order under that sub-section must be passed by the Magistrate granting the pardon, and that he has the option to commit the approver either to police custody or to jail. The learned counsel has not cited any authority in support of his contention and we fail to understand

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why a witness, even if he is an approver, should be placed in a worse position than an accused person. The law is jealous of the liberty of the subject and does not allow his detention by the police unless there is a legal sanction for it. We are not aware of any provision of the law, and certainly none has been cited before us, which would warrant such detention.

As observed by Lord Davey in *Canada Sugar Refining Company* vs. *Regina* (1), "every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter." Moreover, it is for the prosecution to satisfy the Court that the law places an approver in a position worse than that assigned to a witness or an accused person; and this *onus* can be discharged only by citing some statutory provision which lays down in clear and unequivocal language that an approver must be detained in the custody of the police. In a case of doubt or ambiguity, the construction must be in favour of the personal liberty of the subject. As pointed out by Lord Abinger C. B. "the principle that a penal law ought to be construed strictly is not only a sound one but the only one consistent with our free institutions. The interpretation of statutes has always, in modern times, been highly favourable to the personal liberty of the subject, and I hope will always remain so." *Henderson* vs. *Sherborne* (2).

Ex concesso, an approver, if not released on bail, is to be committed to custody in pursuance of a judicial order, and in the case of these four approvers no order was passed by any Magistrate. The learned

(1) 1898 A. C. 735, 741. (2) (1837) 2 M. and W. 236, 239.

Government Advocate stated at the commencement of his arguments before us that the Magistrate granting the pardon had made an order directing their detention in police custody, but when asked to produce the order in question he admitted that there was no such order in writing. He, however, suggested that the failure of the Magistrate to direct their detention in judicial custody should be taken as tantamount to his acquiescence in their detention in police custody. It appears that the approvers were produced from the police custody before the Magistrate for tender of pardon, and were taken back to police custody after they had accepted the pardon and made their statements. It is clear that the Magistrate was never called upon to consider, nor did he apply his mind to, the question of the custody of the approvers.

The learned Government Advocate does not suggest that an approver must always be kept in police custody, and that his detention in judicial custody must be treated as illegal. And we have already pointed out that there is no authority to support his contention that the Magistrate tendering pardon has a discretion to direct the detention of the approver either in police custody or in judicial custody. But, assuming for the sake of argument that such discretion is conferred by the law, there can be no conceivable objection to the High Court exercising it, more especially when the Magistrate had not, as stated above, passed any order on the subject. It cannot, therefore, be argued that the High Court acted illegally when it exercised the power which might have been exercised by a Magistrate subordinate to it.

It is obvious that an approver is not a convicted prisoner, but when his detention is ordered by a Court

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of law under section 337 (3) of the Code, he comes within the category of " criminal prisoner " as defined by section 3 (2) of the Prisons Act, IX of 1894. And section 4 imposes upon the Local Government the duty of providing for prisoners accommodation in prisons as ordained by that Act. Moreover, the officer-in-charge of a prison is enjoined by section 3 of the Prisoners Act, III of 1900, to receive and detain all persons duly committed to his custody by any Court.

The learned Government Advocate also places his reliance upon a notification which was issued by the Local Government while the previous case was pending in the High Court. That notification directs the confinement of the approvers " in that portion of the Lahore Fort which is in the occupation of the Police." Section 541 (1) of the Code of Criminal Procedure, under which this notification was issued, provides that " unless when otherwise provided by any law for the time being in force, the Local Government may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined." Now, this sub-section can come into operation only when there is no other law providing for the custody of an approver. But, as stated in the preceding paragraph, the Prisons Act makes ample provision for the detention of every person committed to custody by a Court of law, and it is admitted that an approver can be committed to custody only by a Court.

Moreover, the sub-section empowers the Local Government to prescribe a *place* for the confinement of the person mentioned therein, and it cannot be invoked for the purpose of prescribing the *custody* in which he is to be kept. There can, however, be

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little doubt that the notification in question, though nominally prescribing a place, amounts to a direction that the approvers shall be detained in police custody. Now, it is a well-recognised doctrine that directions, rules or bye-laws, issued under a statutory power, must not be in excess of the power authorising them, nor repugnant to the statute or to the general principles of law. We consider that the general principles, no less than the rules governing the custody of the accused persons, point to the conclusion that an approver cannot be detained in police custody. The notification relied upon by the learned counsel for the Crown must, therefore, be held to be *ultra vires*.

It is to be observed that the power conferred by the sub-section has not been exercised during the last fifty years except for the purpose of detaining these approvers; and the learned Government Advocate has expressed his inability to indicate the special cases to which it was intended to apply.

We have bestowed our careful attention upon the arguments advanced on both sides, and after considering the matter independently of the previous judgment referred to above, we find that the conclusion reached by us coincides with the rule enunciated in that judgment (1). We must, therefore, hold that the applicant is detained in lawful custody, and his application is accordingly dismissed.

N. F. E.

Application dismissed.

(1) See page 604 *supra*.