

KESHAV TALPADE *v.* KING EMPEROR.

[SIR PATRICK SPENS C. J. SIR SRINIVASA VARADACHARIAR
and SIR MUHAMMAD ZAFRULLA KHAN JJ.]

Federal Court—Practice—Appeal from order dismissing application for writ of habeas corpus—Applicant released by Government before hearing of Appeal—Procedure—Propriety of pronouncing opinion on the merits—Criminal Procedure Code, 1898, s. 491.

Where an application for a writ of *habeas corpus* under s. 491 of the Criminal Procedure Code was dismissed by the High Court and the applicant preferred an appeal to the Federal Court from the judgment of the High Court, but the applicant was released by the Government before the appeal came on for hearing: *Held*, that all that the Court could do at this stage was to dismiss the appeal on the ground that no order on the application could be made and that the Court would not pronounce an opinion on the correctness of the judgment of the High Court.

APPEAL from the High Court at Bombay.

This was an appeal from an order of the Bombay High Court dated July 2, 1943, in Criminal Application No. 86 of 1943. The facts are stated in the argument or counsel for the appellant.

1943. Nov. 1. *G. N. Joshi (D. P. Dhupkar* with him) for the appellant. The appellant was arrested on the 24th August, 1942, under r. 129 of the Defence of India Rules and detained under r. 26 of the said Rules. He filed an application in the nature of a writ of *habeas corpus* under s. 491, Cr. P.C., being Criminal Application No. 86 of 1943, for his release. This application was dismissed on the 10th March, 1943, and an appeal was preferred to the Federal Court. The Federal Court decided on the 22nd April, 1943, that r. 26 was *ultra vires* and remitted the case to the High Court for disposal of the case in the light of the observations made in judgment of the Federal Court. Ordinance XIV of 1943 was promulgated on the 28th April, 1943, to validate r. 26. The Bombay High Court referred the case back to the Federal Court for a declaration as to the nature of the order that was to be substituted for the order appealed against. The Federal Court by their order of the 31st May,

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1943, confirmed their previous order of the 22nd April, 1943, and returned the papers to the Bombay High Court observing that it will be for that Court to adopt such course as it deemed most convenient in the light of the observations contained in their order. The matter was again heard by the Bombay High Court and in a judgment dated 2nd July, 1943, the High Court, by a majority, held that the detention of the appellant was not invalid in view of the Ordinance dated the 28th April, 1943, which in their view had retrospective effect. The appellant has preferred an appeal to this Court and it is now before your Lordships. The appeal was filed on the 10th August, 1943. Under s.209 of the Constitution Act the decision of this Court must be given effect to by the High Court. The detention of the appellant from the 22nd April till his release was illegal.

[SPENS C. J. If the appellant has been set free, how can this appeal be proceeded with?]

Though my client has been released, I want a pronouncement by this Hon'ble Court that his detention from the 22nd April till his release was illegal.

N. P. Engineer, A.-G., of Bombay, (M. M. Desai with him) for the respondent. The appellant was released on the 10th of August, 1943.

Nov. 2. The judgment of the Court was delivered by SPENS C. J. This appeal arises out of an application for a writ of *habeas corpus* made by the appellant to the Bombay High Court in February, 1943. The matter had come before this Court on two previous occasions in April and May, 1943, but the orders of this Court on those occasions did not finally dispose of the matter. By its order dated 2nd July, 1943, the High Court (by a majority judgment) dismissed the application and this appeal has been preferred against that order.

The appellant takes exception to the grounds on which the High Court has rested its adjustment, including its view as to the effect of the orders of this Court. But it is admitted that the appellant has

already been released. This appeal was filed on the 10th of August and it is stated by the Advocate-General of Bombay that the appellant was released on that very day, though it is not quite clear whether the order of release was passed on that date or the appellant was in fact set free on that date. As the appellant is no longer in custody, his learned counsel admits that no order can hereafter be made on the *habeas corpus* application; but he nevertheless asks us to pronounce an opinion on the correctness of the High Court's judgment. We do not see our way to adopt any such course. All that can be done at this stage is to dismiss the appeal on the ground that no order on the application can now be made.

Appeal dismissed.

Agent for the appellant : R. G. Naik.

Agent for the respondent: B. Banerji.

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[SIR PATRICK SPENS C. J., SIR SRINIVASA VARADACHARIAR
and SIR MUHAMMAD ZAFRULLA KHAN JJ.]

Federal Court—Practice—Leave to appeal to His Majesty in Council from order arising out of application for writ of habeas corpus—Detenu released during pendency of application for leave to appeal—Incompetency of application.

Where, during the pendency of an application for leave to appeal to His Majesty in Council against an order made in an appeal arising out of a *habeas corpus* application, the detenu was released by the Government on their own initiative: *Held*, that, as there was no longer any pending matter in which leave to appeal could be granted and the original petitioner had no longer any interest in the *habeas corpus* proceedings, leave could not be granted.

APPLICATION for leave to appeal to His Majesty in Council.

This was an application under s. 208(b) of the Government of India Act, 1935, for leave to appeal to His Majesty in Council from the judgments of the Federal Court dated the 22nd April, 1943, and 31st May, 1943, in Federal Court Case No. V of 1943.

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