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Present: Schneider A.C.J., Garvin, Lyall Grant, and Maartensz JJ.

In the Matter of an Application for a Writ of *Habeas corpus* on the Body of THOMAS PERERA *alias* BANDA.

P. C. Colombo (Itg.) 43,833

Habeas corpus—*Warrant of commitment issued by Commissioner of Assize—Power of Supreme Court to review order—Warrant defective—Release of prisoner.*

The Supreme Court has no power to review the order of a Commissioner of Assize in issuing a warrant of commitment remanding a prisoner to custody.

Where such a warrant was *ex facie* defective, the Supreme Court can order the discharge of the prisoner.

THIS was an application for a writ of *habeas corpus* made by petition by the wife of one Banda, who was on remand in the Hulftsdorp jail, awaiting his trial upon a charge of murder. It was alleged in the petition that prisoner stood his trial for murder before the Commissioner of Assize at Colombo, and that at the conclusion of the trial on October 28, 1926, the jury, divided as five to two, brought in a verdict of acquittal of the prisoner. The Commissioner of Assize thereupon requested them to reconsider their verdict, and when the jury returned after further deliberation His Lordship discharged them and remanded the prisoner to jail, pending his trial before another jury. It was claimed in the

petition that under the circumstances the prisoner had been acquitted by the jury, and that, as the Commissioner had no right to remand him, his detention was illegal.

R. L. Pereira (with *de Jong* and *Sri Nissanka*, instructed by *E. C. Ratnaike*), in support.

Akbar, S.-G. (with *Mervyn Fonseka, C. C.*), for the Crown.

December 16, 1926. SCHNEIDER A.C.J.—

This application for a writ of *habeas corpus ad subjiciendum* was made by petition by one Sopia Nona, the wife of one Banda, who was on remand in the Hulftsdorp jail, awaiting his trial upon a charge of murder, punishable under section 296 of the Penal Code, and of having caused evidence of the commission of that offence to disappear, punishable under section 198. It was alleged in the petition, to which the only respondent was the Fiscal of the Western Province, that at the conclusion of the trial of the prisoner on October 28, 1926, the jury, divided as five to two, brought in a "verdict of acquittal of the prisoner on both counts," that the Commissioner of Assize requested them thereupon to reconsider their verdict, and when the jury returned once again after further deliberation he discharged them, purporting to act under section 230 of the Criminal Procedure Code, and remanded the prisoner to jail pending his trial before another jury. The petitioner claimed that in the circumstances the prisoner had been acquitted by the jury, and that as the Commissioner had no right to remand him, his detention was under a warrant which was invalid. She prayed that the prisoner "be acquitted and discharged" and his body be delivered to her. The application would have been disposed of by a single Judge in Chambers according to the ordinary routine but for its extraordinary nature. It was accordingly decided that it should be listed and heard before a bench consisting of the four Judges who happened to be in Colombo at the time, in order that an authoritative decision might be obtained upon a matter of law which had not been adjudicated upon previously. The matter of law was whether, upon this application for a writ of *habeas corpus*, it was competent, for this Court to go behind the warrant of commitment and inquire into the circumstances in which the order was made for the issue of the warrant for the purpose of deciding the validity of the warrant. It should be mentioned here that the petitioner did not allege that the warrant under which the prisoner was in custody was not otherwise good and valid. The Court directed notice of the hearing of the application to be given to the parties, and also to the Attorney-General. It also directed the respondent Fiscal to produce the body of the prisoner before the Court at the hearing. The prisoner was produced. Questioned in Court he stated that the application was made with his knowledge

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and consent. The Solicitor-General stated that he appeared as *amicus curiae*. The Court is indebted to him for the valuable assistance he rendered in the discussion of the matter of law. At the request of the Court, counsel who appeared for the petitioner confined his arguments to the question whether we had the power upon the application to inquire into the validity of the order remanding the prisoner to custody. At the close of the argument it was discovered that the warrant of commitment had been produced in Court. It was scrutinized by the petitioner's counsel and the Solicitor-General. Both were agreed that it was insufficient for the detention of the prisoner in jail. It disclosed that it had been issued under the hand of the Commissioner of Assize under date October 26. It recited that the prisoner was indicted before the Supreme Court on October 26 on a charge of murder, and that it had become necessary to adjourn the trial of the prisoner to October 27, and to remand him to be produced before the Court on October 27 " and on any day thereafter to which the trial may be postponed." It directed the Fiscal to detain the prisoner in the jail at Hulftsdorp till October 27, and to produce him at the Supreme Court on that date " and on every day to which the trial may be postponed." The commitment clearly referred only to the trial which began on the 26th and ended abortively on the 28th. It was authority for the detention of the prisoner in custody till that trial was concluded, which was, as I have already stated, on October 28, by the rejection of the verdict of the jury by the Commissioner. Its force was spent and gone after that. Section 252 of the Criminal Procedure Code lays down the procedure which should be followed in those circumstances. It gives the Judge absolute discretion, after the jury has been discharged, to detain the prisoner in custody or to release him on bail but it enacts that the prisoner " shall be tried by another jury." No order of the Judge is necessary for that purpose. The provisions of the section mark a new period in the proceedings in regard to the detention of the prisoner. For his detention after that event a fresh warrant was essential. As the warrant was issued in this instance by a Commissioner of Assize, who is to be regarded as a Judge of the Supreme Court for that purpose, it was a warrant issued by the Supreme Court, and under the provisions of section 289 (3) of the Criminal Procedure Code it need not contain the reasons for the remand. A trial before another jury is a distinct trial from the one which had proved abortive. The ground for the commitment to await this trial is different. We, therefore, came to the conclusion that the warrant exhibited by the Fiscal as the authority for the prisoner's detention was defective, and forthwith directed his discharge from imprisonment under that warrant. We reserved our order upon the matter of law which was discussed.

In the circumstances the necessity for the decision of that matter of law ceased to exist upon our holding that the warrant was defective. But as it has been fully argued, and a special sitting of the Court held for its argument, I would proceed to discuss the matter of law, and to express my opinion.

The origin of the power of the Supreme Court to issue writs of *habeas corpus* was not discussed, but as at present advised I think that its present powers are entirely those conferred by section 49 of the Courts Ordinance, 1889 (No. 1 of 1889). The purport, and purpose, of the writ as that section enacts is to bring up before the Court or Judge (*a*) the body of any person to be dealt with according to law, (*b*) the body of any person illegally or improperly detained in public or private custody. This section is obviously founded upon the existing English law. It would be helpful therefore to refer to that law. In England the writ had its origin in the Common law, but although not created by statute it has been confirmed and regulated by various statutes. The general purpose of the writ there, as here, is to obtain the production of an individual. In England originally the writ afforded a remedy only for illegal imprisonment, but in later times its scope was extended. An unauthorized detention of a child from the legal custody of its parents or guardians was regarded for the purposes of the issue of the writ as equivalent to imprisonment. The writ was also made available to a husband to regain the custody of his wife who was being wrongfully detained from him against her consent, for the reason that a husband under the Common law is entitled to the custody of his wife as against all persons. Where the person is "detained in private custody" it is apparent that the Judge or Court must inquire into the circumstances to ascertain the legality of the detention. But where the person is, as our Ordinance expresses it, "illegally or improperly detained in public custody" the question of the procedure to be followed is not so simple. The general principles and procedure are stated in the books [1] on English law as follows: If the persons are detained under a warrant or order of commitment, the legality of the imprisonment depends upon the validity of the warrant or order. The validity of the legal process by virtue of which the person is detained may be decided by means of the writ of *habeas corpus*. If it appears clearly that the fact for which the prisoner is committed is no crime, or that it is a crime but he is committed by a person who has no jurisdiction, the Court discharges. In cases where the conviction or order itself is illegal or defective as distinguished from cases where the commitment is defective, it is necessary to obtain a writ of *certiorari* directed to the convicting Magistrate to return the conviction of proceedings to the King's Bench in addition to

[1] *Encycl. of the Laws of England—under head* Habeas Corpus; *The Laws of England; Criminal Practice—under head* Habeas Corpus Certiorari.

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the *habeas corpus* to bring up the warrant. The writ of *certiorari* is a writ issued out of a superior Court and directed to the Judge or other officer of an inferior Court of record, requiring the record of the proceedings in some cause or matter depending before such inferior Court to be transmitted into the superior Court to be there dealt with. The transmission of records from certain Courts is in some cases effected by orders in the nature of *certiorari*. The writ of *habeas corpus* will not be granted where the effect would be to review the judgment of one of the superior Courts which might have been reviewed on writ of error. Writ of error has now been abolished by the Criminal Appeal Act, 1907,[1] which constituted a Court of Criminal Appeal and created a right of appeal in the case of conviction on indictment.[2]

One of the statutes regulating the writ of *habeas corpus* is *16 Car. 1 c. 10.* The provisions of section 6 of it are worth noting, as showing that it is only the cause appearing on the face of the warrant which is considered. It enacted that any person restrained of his liberty, upon demand, or motion, to the Judges of the Court of King's Bench or Common Pleas should without delay have forthwith granted to him a writ of *habeas corpus* directed to the person in whose custody he may be, and that the person to whom the writ is directed must bring, or cause to be brought, the body of the party so restrained before the Judges of the Court from whence the writ issued, and that the Court must examine and determine whether the cause of commitment *appearing upon the return* be just or legal, or not.

An examination of the provisions in the Courts Ordinance and the Criminal Procedure Code relating to the writ of *habeas corpus* and the power or revision by the Supreme Court will disclose that our law is framed upon the principles and procedure recognized in England.

The application under consideration prays that we should review the order of the Commissioner of Assize remanding the prisoner to jail and acquit and discharge him. So long as that order stands the imprisonment is valid and the prisoner cannot be discharged unless, as it happened in this case, the warrant is defective on the face of it. We, therefore, asked the petitioner's counsel to refer us to any decisions, local or English, or any provision of the law supporting his contention that we had the power to review the order of the Commissioner of Assize. He was unable to refer us to any such authority. He conceded that if the order had been made by one of the Judges of the Supreme Court we would not have the power to review it. He did right in so conceding. If one or more Judges

[1] *Section 21, 7 Edw. VII. c. 23.*

[2] *Ex parte Purday—L. J. (1859) M. C. 95. In re Dunn—L. J. C. P. 97. The King v. Justices of the Central Criminal Court—(1925) 2 K. B. 43.*

of this Court had the power to set aside an order made by another Judge of this Court is would lead to some startling results. A single Judge sitting in Chambers dealing with applications for writs of *habeas corpus* under the provisions of section 50 of the Courts Ordinance might set aside such an order, as that made by the Commissioner, which is made by a bench of three Judges of the Supreme Court sitting with a jury for the trial of an accused person under the provisions of section 31 of that Ordinance. Where the Legislature intended a bench composed of more than one Judge of this Court to have the power to review an order made by a single Judge it has expressly conferred that power (section 40). That fact is destructive of any argument based upon our having an inherent power to revise proceedings.

I think—once again without hearing any argument on the point—that the jurisdiction of the Supreme Court, both original and appellate, is that conferred by section 21 of the Courts Ordinance. Its powers of revision are placed in that section under its appellate jurisdiction and described as being " for the correction of all errors committed by any original Court." In the exercise of those powers it has " sole and exclusive cognizance by way of revision of all causes, suits, actions, prosecutions, matters, and things of which such original Court may have taken cognizance." It is true that the Supreme Court has also an original jurisdiction, but the provisions of sections 356 to 360 of the Criminal Procedure Code render it clear that the powers of revision are in regard to the acts of inferior Courts. They speak of the Supreme Court " calling for the record of any case from any Court." That language clearly cannot mean its own records. The same thing might be done by writ of *certiorari* by virtue of the powers conferred by section 46 of the Courts Ordinance. The writ of *certiorari*, we know, is only issued from a superior Court to an inferior Court. Section 359 makes provision for the District Judge or Magistrate submitting with the record a statement when the record is called for. It contains no reference to what should be done if the record called for is of the Supreme Court itself. The provisions of section 360, that the order of the Supreme Court is to be certified to the Court by which the order revised was passed, and that that Court must carry out the order of the Supreme Court, clearly indicate that the order revised is not of the Supreme Court. In *Rex v. Justices of the Central Criminal Court, Ex parte London County Councils*,[1] in which several cases are discussed and considered, it was held that the King's Bench Division of the High Court of Justice had no jurisdiction to issue a writ of *certiorari* for the purpose of removing into that Court an order of the Central Criminal Court with a view to its being quashed on the ground that the Central Criminal Court was

[1] *(1925) 2 K. B. 43.*

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also a superior Court. One of the cases referred to is *Ex parte Fernandes*,[1] in which Willes J. said:—

> "It thus appears to me very clearly, whether I consider the origin, the history, the procedure, or the jurisdiction of the Court of Assize, or the estimation in which it has ever been held, that I must class it as a superior Court of a high order."

Speaking of Judges of Assize, he said:—

> "They belonged to that superior class to which credit is given by other Courts for acting within their jurisdiction, and to whose proceedings the presumption *omnia rite esse acta* applies equally as to those of the Supreme Court of Parliament itself."

Lord Hewart C.J. in the course of his judgment in *Rex v. Justices of the Central Criminal Court* (*supra*) said that the conclusion which the judgments support might be expressed in this way:—

> "Judges of Assize exercise powers upon the same plane with powers exercised by Judges of a High Court in that Court."

I therefore conclude that we have no power to revise the order of the Commissioner of Assize. But the petitioner's counsel sought to escape from this position by arguing that a Commissioner was not a Judge of the Supreme Court inasmuch as he had no appellate jurisdiction. That argument is wholly unsustainable. In considering his jurisdiction we need only inquire what is his jurisdiction on the original side of this Court. Section 25 of the Courts Ordinance confers upon him "all the rights, powers, and privileges of a Judge of the Supreme Court," and section 26 enacts that a criminal sessions of the Supreme Court held before a Commissioner is to be "deemed and taken to be a sessions of the Court within the meaning" of the Courts Ordinance and the Criminal Procedure Code "in the same and in the like manner as if the same were holden by one of the Judges" of the Supreme Court.

Of the local decisions cited to us by the petitioner's counsel only two are in point and need be mentioned. The earlier decision of these two is *In the matter of Daniel McSweeny*, where a bench of three Judges of this Court discharged a party produced before it by the Fiscal on return to a writ of *habeas corpus* on the ground that the return did not state why he was being detained, despite the offer made by the Attorney-General to call evidence to prove that the detention was for a lawful reason. The other is the case *Loku Banda v. Bodia*,[3] in which Phear C.J. quashed the conviction, sentence, and commitment of a prisoner who was brought before him as on a return to a writ of *habeas corpus*, and the proceedings

[1] *10 C. B. (N. S.) 3.*

[2] *Legal Miss. (1864) 58.*

[3] *(1878) 1 S. C. C. 35.*

and evidence in the case in which he was convicted was brought before him as if by way of *certiorari*. He held that the commitment on the face of it was insufficient as not containing a statement of the offence, and that the conviction was also bad in law. Both these cases do not support the contention of the petitioner's counsel, but are against it They both show that on a return to a writ of *habeas corpus* it is only the judicial process which is considered, and that if it be necessary to inquire into the validity of the order upon which the process is based, the order has to be of a Court of inferior jurisdiction and must be brought up by way of revision.

My order on this application is that it should be dismissed in so far as it prays for a review of the order made by the Commissioner, and that the prisoner be acquitted.

LYALL GRANT J.—

This is an application for a writ of *habeas corpus*. The relevant facts alleged are that the Commissioner of Assize appointed to hold the Colombo Sessions of the Supreme Court at Colombo tried with a jury the petitioner who was accused of murder. The jury returned a verdict of not guilty by a majority of five to two. The Commissioner asked the jury to reconsider their verdict, and on their doing so, without asking what their reconsidered verdict was, discharged the jury and recommitted the prisoner for trial before another jury.

The learned Commissioner based his action on section 236 of the Criminal Procedure Code, which runs as follows :—

> "The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar and whenever in the opinion of the Judge the interests of justice so require."

The first question which presents itself is whether this Court has any jurisdiction to review an order made by a Commissioner of Assize, and this was the only question argued before us.

The section under which we are asked to act is section 49 of the Courts Ordinance.

The section authorizes any Judge of the Supreme Court to issue mandates in the nature of writs of *habeas corpus*.

An examination of the terms of the section leads me to the conclusion that it is not intended that this jurisdiction shall extend to the review of decisions of a Supreme Court Judge.

By section 25 a Commissioner of Assize is invested with all the rights, powers, privileges, and immunities of a Supreme Court Judge, and by section 26 all the provisions of the law which relate to the criminal sessions of the Supreme Court apply to criminal sessions held by a Commissioner.

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Errors committed by a Judge of the Supreme Court may, in certain cases, be dealt with by other Judges of the Supreme Court under the powers given by section 39, but the present case is not one contemplated by that section.

Section 332 of the Criminal Procedure Code provides that no appeal shall lie from any judgment or order of a Criminal Court except as provided for by the Code or any other law for the time being in force.

It is admitted that there is no law allowing any appeal from an order made by a Judge or Commissioner sitting with a jury—always excepting the general right of appeal to His Majesty in Council.

In England such an order as the one under review would now be subject to appeal. Before the institution of the Court of Criminal Appeal it could have been made the subject of a writ of error. The authorities make it clear that it would not have afforded ground for a writ of *habeas corpus*.

Under our law there is no appeal and no provision for a writ of error. It is admitted that the only possible section under which these proceedigns can be brought is section 49 of the Courts Ordinance. That section will no doubt apply where there is irregularity appearing on the face of the warrant, as was the case in *Lokubanda v. Bodia*.[1] In such a case the jailer has no proper and legal authority to detain the prisoner. Where there is a warrant in due form by a Judge the jailer has no option but to detain.

On the production in Court of the warrant during the proceedings before us, it appeared that it did not in fact authorize the detention of the prisoner beyond the conclusion of the existing trial. After that date, therefore, the prisoner was unlawfully detained and was released by order of this Court. This affords an illustration of the principle set forth above that the Court can deal with a warrant *ex facie* irregular.

Habeas corpus proceedings are not intended for the purpose of reviewing the decisions of superior Courts, which are necessarily to be regarded as lawful until they are set aside. Where the law does not provide for such review the decision of the Judge making the order must be accepted as correct in law.

For the reasons above set forth, I would advise that the rule be discharged.

On the question of the correctness of the order made by the learned Commissioner of Assize, a question which has not been argued before us, I express no opinion.

GARVIN J.—I agree.

MAARTENSZ A.J.—I agree.

[1] *(1887) 1 S. C. C. 35.*