[IN REVISION.] 1926.

Present: Schneider A.C.J.

THE KING *v.* PERERA *et al.*

D. C. (Crim.) Colombo, 7,902.

Criminal Procedure Code, s. 350 (2)—Appeal by accused—Certified order affirming conviction and sentence—Discretion of the Court of first instance to defer communication to accused.

Where the conviction of an accused was affirmed in appeal and the record sent back to the District Court for the purpose of carrying out the order of the Supreme Court in the case,—

Held, that the District Court had no authority under section 350 (2) of the Criminal Procedure Code to extend the time fixed for the accused to appear and hear the decision of the Supreme Court until the result of an application to suspend the execution of the sentence was known.

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TWO persons, who were indicted before the District Court of Colombo, were, after due trial, found guilty and sentenced to a term of four months' rigorous imprisonment each. An appeal from the conviction and sentence was submitted to the Supreme Court. the accused being enlarged on bail. In due course, the order of the Supreme Court affirming the conviction and sentence was certified to the lower Court, and the record of the case was returned to the District Court to enable the latter to carry out the order of the Supreme Court in compliance with the provisions of the Criminal Procedure Code. When the accused appeared before the District Court to hear the order of the Supreme Court, it was submitted on their behalf, that an application had been made to the Governor for a suspension of the execution of sentence pending the decision of the case in the Privy Council, and that the accused should be enlarged on bail till the Governor's pleasure was known. The Attorney-General, however, had no notice of this application. The District Judge, being of opinion that a Court of first instance had an unlimited discretionary power to extend the time fixed for accused persons to appear to hear the decision of the Court of appeal, directed the accused to give bail for their appearance on a later date. The Solicitor-General moved for a ruling on the legality of this order.

Obeyesekere, *Deputy S.-G.* (with *R. F. Dias C.C.*), for petitioner.

November 16, 1926. SCHNEIDER A.C.J.—

The appeals of the two accused persons were decided by this Court on October 1. It affirmed the conviction and the sentence of four months' imprisonment of each of them. In compliance with the provisions of section 350 of the Criminal Procedure Code this Court certified its order to the Court of first instance (which was the District Court of Colombo) returning to that Court the record and petitions of appeal accompanied by a copy of the reasons given by this Court for its order.

On October 21 the District Court issued a notice on each of the accused persons to appear before it on November 1 to hear the judgment of this Court. In doing that, it acted under the provisions of section 350 (2). The Fiscal reported that he effected service of this notice on the second-named accused but not on the first, as the latter was not to be found. But on November 1 both accused persons appeared before the District Court and submitted through Counsel a motion in writing that " the Court be pleased to let the accused out on bail until the decision of His Excellency the Governor is known " regarding " an application made to His Excellency the Governor to suspend the execution of the sentence pending the final decision of the case in the Privy Council." A Counsel present

in the Court drew the attention of the Judge to the fact that the Attorney-General had not had notice of the motion, and also referred him to two decisions of this Court reported in the New Law Reports. The District Judge, then and there, delivered a long order in writing in which he discussed those cases and expressed his opinion that under the section he had a discretionary power to enlarge the time originally fixed by him for the accused persons to appear before him. He directed them to give bail to appear again before him on November 12. The accused persons were still at large when the application to which I shall presently refer was made to me, although I am unable to find any writing on the record showing that the District Judge's order as regards the giving of bail was complied with.

The Solicitor-General has brought up the order of the District Judge before me to be dealt with by way of revision. He submits "that the District Judge had no power to fix another date for the appearance of the accused before the District Court," and "that a District Judge acting under section 350 (2) acts not as a Judge but as the ministerial officer of the Supreme Court, and that no discretion is vested in him under the said sub-section." The application made on behalf of the accused persons was a very unusual one. The Attorney-General has a wide interest in the administration of the Criminal Law, and it seems to me that the District Judge should have acted wisely had he directed notice of the application to be given to the Attorney-General. If he had so acted he would have had the advantage of hearing a discussion upon the question he decided. Without such discussion in my opinion, the contention of the Solicitor-General is right, and the order made by the District Judge must be set aside. It is *ultra vires*. The material words of section 350 are the following:—

> "(2) The Court to which such order is certified shall thereupon make such orders as are conformable to the order so certified, and if necessary, the record shall be amended in in accordance therewith."

There is no room for doubt as to the purpose of the section. It was intended to grant a Court of the first instance power to make such orders as are necessary to carry into effect the order of the Supreme Court on appeal. The orders which must obviously be made for that purpose are disclosed in the section itself. They are: (1) such as are necessary to bring the persons affected by the order of the Supreme Court before the Court of first instance in order that the judgment of the Supreme Court might be made known to them; (2) such as are necessary for the purpose of issuing fresh warrants of committal in cases of which illustrations are given below the section; and (3) such orders as are necessary for amending the

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record where there is necessity to do that. The word " thereupon " indicates when he should make these orders. He must make them " upon " the order of the Appeal Court being certified to him. " Thereupon " sometimes means immediately upon something being done or taking place. It is used with that connotation in all those Ordinances which enact that by-laws made under powers granted in the Ordinances shall be published in the *Government Gazette* and that they shall " thereupon be as legal, valid, effectual, and binding as if they had been enacted " in the Ordinances themselves.

The Deputy Solicitor-General who appeared in support of the application for revision pointed to an instance where the word " thereupon " is used in an Ordinance in contrast with the meaning conveyed by the words " as soon as." He referred to section 5 of the Vaccination Ordinance, 1886,[1] which provides that certain persons shall present themselves for vaccination at an appointed place and enacts " And the officer shall, and is hereby required thereupon, or as soon after as may conveniently and properly be done." I do not think the word " thereupon " must always be interpreted as meaning immediately. It would be necessary sometimes to interpret it as meaning as soon as an act which has to be done may conveniently and properly be done. That must be the meaning given to it where it occurs in section 350. Some reasonable time must needs be allowed to a Court after the order is certified to it before it can be reasonably expected to make the necessary orders. It cannot be expected to push aside all its other work for this work. A Judge of a Police Court may have to be absent miles away from his Court upon a sudden call to hold an investigation in a case of murder, or any Judge may be suddenly incapacitated by illness and be unable to attend Court. If the day fixed for the appearance of the accused persons happens to fall during the absence of the Judge, in such circumstances it is but reasonable that the accused should be given another date for their appearance.

The District Judge argues that as he had a discretion as to the date he might fix for the appearance of the accused person before him, that he therefore had also power to fix another date for the same purpose. This argument is not sound. On the date the accused appeared before him there was nothing incapacitating him from making the order necessary for the execution of the sentence. In fact that was the one order he had to make. He argues that he has unlimited discretion as to fixing the date when an accused person is to appear before him. This argument too is not sound. In fixing a date, what he should reasonably take into consideration is the time necessary for the service of the notice, and the appearance of the persons before his Court. There is but one test as to the orders which it is competent for him to make. In the language of the

[1] *No. 20 of 1886.*

section they must be " conformable to the order " certified to him. The order certified to him in this case was that the accused persons were to undergo imprisonment. The only order conformable to that order which he should have made was one committing the accused to jail to undergo the sentence of imprisonment imposed on them. But the order which he did, in fact, make was not only not conformable to the order certified, but was contrary to the order certified. His order is contrary not only to the intention but even the letter of the Law. The section was never intended to enable a Judge of a Court of first instance to defer the date of the commencement of the sentence pending the result of an application such as the accused said they had made to His Excellency the Governor. The District Judge had no legal justification for the order he made, and I set it aside. Before this reaches his Court the adjourned date will have arrived and be past. But the Deputy Solicitor-General pressed on me the necessity for a ruling as a guide to other Judges of Courts of first instance in similar circumstances. The notice which issued from this Court to the accused persons regarding the application for revision was served on only one of them. The other was reported to have gone to Jaffna. Only the one who had been served appeared before me. If no security had in fact been given, the District Judge should satisfy himself why his order as to the giving of security was not carried out.

Order set aside.