1953 *Present :* **Nagalingam S.P.J.**

THE ATTORNEY-GENERAL, Applicant, *and*
R. DISSANAYAKE, Respondent

S. C. 263—Application for Revision in M. C. Colombo, 25,777

Appeal—Order of Supreme Court—Duty of court of first instance to execute it—Power of Supreme Court to permit conditional release of offenders—Courts Ordinance, s. 37—Criminal Procedure Code, ss. 325, 350.

When a criminal case is decided on appeal and the record of the case is returned to the court of first instance, it is the duty of the lower court, under section 350 of the Criminal Procedure Code, to carry out the order of the Supreme Court on the unquestionable basis that the order of the Supreme Court is right. The Magistrate (or District Judge) must then act as the ministerial officer of the Supreme Court and cannot question the correctness of the order of the Supreme Court.

Although a Magistrate cannot discharge an offender conditionally under section 325 of the Criminal Procedure Code if he proceeds to conviction, the Supreme Court, when it exercises its appellate or revisionary powers, may, without disturbing the order of conviction made by a Magistrate, proceed to order the accused person to be discharged conditionally on his entering into a bond in terms of that section.

Perera v. Punchi Appuhamy (1944) 45 N. L. R. 214, followed.

APPLICATION to revise an order of the Magistrate's Court, Colombo.

H. A. Wijemanne, Crown Counsel, with *A. Mahendrarajah*, Crown Counsel, for the Attorney-General.

N. E. Weerasooria, Q.C., with *M. M. Kumarakulasingham*, for the accused respondent.

Cur. adv. vult.

October 14, 1953. NAGALINGAM S.P.J.—

In this case the learned Chief Magistrate of Colombo has crucified justice on a cross of judicial indiscretion. The Attorney-General intervenes and points out that an absurd situation has been reached in these proceedings by the learned Magistrate purporting to sit in judgment over and nullify the effect of an order made by this Court, the supreme tribunal in the Island ; and that the absurdity reaches fantastic heights when it becomes patent that the view taken by the learned Magistrate it is that is erroneous.

The facts lie within a narrow compass. The respondent was convicted by the learned Magistrate of having caused hurt to his wife and sentenced to undergo three months rigorous imprisonment. On appeal My Lord the Chief Justice while affirming the conviction set aside the order of imprisonment and directed that the respondent should be " bound over in the sum of Rs. 500 in his own recognizances to be of good behaviour for a period of twelve months". In pursuance of the order of this Court the learned Magistrate directed the respondent to " enter into the bond as ordered by the S. C." (Supreme Court). The bond was signed on 19th February, 1953, before the learned Magistrate himself. On 5th May, 1953, the prosecuting Inspector brought to the notice of the learned Magistrate that the respondent had been convicted, while the bond was still in force, of another offence, and moved that the respondent be called upon to show cause why he should not be convicted and sentenced in this case. Notice was duly served on the respondent. The respondent appeared, and was also represented by proctor. Both the respondent and his proctor stated that they had no cause to show. The learned Magistrate thereupon proceeded to make this order :—

> " I am afraid that this bond is not enforceable. The accused was convicted in this case and sentenced to three months' R.I. He appealed against that conviction. In the course of the order of the Supreme Court, it is stated that the conviction is affirmed. At the end the order says that the accused will be bound over in a sum of Rs. 500 in his own recognizances to be of good behaviour for a period of twelve months. The binding over is obviously under section 325 (1) of the Criminal Procedure Code, this being a summary charge. That section expressly states that the Court can make an order for a binding over only if it does not proceed to conviction. With very great respect, I would say that an accused cannot be bound over if the Court proceeds to conviction. Therefore, I regret, I am unable to enforce this bond. So, I discharge the accused."

There is nothing on record to indicate that the learned Magistrate before making this order afforded the prosecuting Inspector an opportunity of being heard against the order he proposed to make ; nor indeed does he even appear to have invited the assistance of the proctor for the accused to see what support he could derive from him for the view he had taken in regard to the order of this Court ; but the learned Magistrate made his order without hearing any argument.

Assuming for a moment—and it cannot be too strongly emphasized that the assumption is altogether fallacious—that there was some defect or irregularity in the order made by this Court, the question then arises as to what course should be adopted by a Magistrate in such an event. Is it open to a Magistrate to treat an order of this Court as erroneous and therefore of no legal effect ? It is elementary to state that—

> " a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right, and *if that course is not taken, the decision, however wrong, cannot be disturbed.*"

—per Lord Hobhouse in the Privy Council in the case of *Malkarujan v. Narhare and another* [1].

The order of this Court was made as early as 22nd January, 1953. That order was binding upon the parties to the proceedings. Either party dissatisfied with that order or claiming that the order was contrary to law had, if at all, a right to go before a tribunal having appellate powers over this Court in order to have the wrong set right. But where no such action was taken, the order, however erroneous, was binding on them and of full force and effect. In fact the Magistrate himself, as he was bound to do, treated the order as binding on the respondent, for he called upon him to execute a bond in terms of the order of this Court. On the other hand, it would have been ridiculous to suggest that a Magistrate to whom an order of this Court is transmitted could regard himself as an appellate tribunal possessing powers on a par with those of the Privy Council and take upon himself the misguided duty of determining whether the order of this Court is right or wrong.

This Court is empowered, on the hearing of any case in appeal before it, to pass such judgment, sentence, decree, or order, or to give such direction to the Court below as it shall think fit (section 37, Courts Ordinance), and when a case is decided on appeal by it, it certifies its order under its seal to the court of first instance, and such Court thereupon has to make such orders as are conformable to its order (section 350, Criminal Procedure Code). In view of these provisions, it would be obvious that the Magistrate to whom an order of the Supreme Court is transmitted " acts not as a Judge but as the ministerial officer of the Supreme Court, and no discretion is vested in him".—See for a discussion of this question the case of *King v. Perera* [2].

I do not therefore think it was competent to the Magistrate to assume jurisdiction as a Judge and to express any opinion on the correctness or otherwise of the order of this Court. The learned Magistrate was completely wrong in taking upon himself the self-imposed duty of determining the regularity or otherwise of the order of this Court, for all that he had to do at that stage was to carry out the order of this Court on the unquestionable basis that the order of this Court is right.

On this occasion it is not necessary to say more than to remind the learned Magistrate that no usurpation of powers will be tolerated by this Court.

[1] *(1900) I. L. R. 25 Bombay, 337 at 347.* [2] *(1926) 28 N. L. R. 151.*

I shall now proceed to consider whether the learned Magistrate was correct in the view he took that the order made by this Court on appeal was erroneous. Had he invited assistance from the parties before him, succour may have been proferred and his attention drawn to previous decisions of this Court embodying the correct principles to be applied in circumstances such as those that confronted the learned Magistrate. There have been several previous instances where, without the propriety or otherwise of the order being discussed, this Court has affirmed the conviction entered by a Magistrate but deleted the sentence of imprisonment or fine and directed that the accused be discharged conditionally on his entering into a bond in terms of section 325 of the Criminal Procedure Code.

However, the point was specifically raised and debated and a considered judgment given by this Court in *Perera v. Punchi Appuhamy et al.*[1] That judgment was delivered by Soertsz J., and he expressly held that while, no doubt, a Magistrate cannot discharge an offender conditionally under section 325 of the Criminal Procedure Code if he proceeds to conviction (see the cases of *Marthelis v. James*[2] and *Fernando v. Inspector of Police, Panadura*[3]) it was competent to the Supreme Court in the exercise of its appellate or revisionary powers to affirm the conviction, or rather, without disturbing the order of conviction made by a Magistrate, to proceed to order the accused person to be discharged conditionally in terms of section 325 of the Criminal Procedure Code. That decision has been followed since in more than one case. The order of this Court, the correctness of which was doubted by the learned Magistrate, is therefore not only in consonance with previously decided cases of this Court, but is legally sound.

The order, therefore, made by My Lord the Chief Justice, if I may respectfully say so, is a right order and not a wrong order. The Magistrate, therefore, was clearly mistaken in saying that " an accused cannot be bound over if the Court proceeds to conviction " —a statement which can only be defended in relation to an order made by a Magistrate and not in relation to an order made by the Supreme Court. Manifestly, therefore, the order of the Magistrate whereby he expressed his inability to enforce the bond is altogether erroneous, and I therefore set it aside.

The next question is whether the respondent having shown no cause against his being convicted and sentenced in this case, he could properly be proceeded against. Learned Crown Counsel submits that it is not possible to do so in view of the terms of the bond entered into by him, as the bond that was entered into is a bond that is not in accordance with the order of this Court. That the bond directed to be taken by this Court could only have been taken in terms of section 325 of the Criminal Procedure Code there can be little doubt. That the learned Magistrate correctly construed the order of this Court in that sense, though there was no express reference to that section, is abundantly clear, for the Magistrate remarks that the " binding over is obviously

[1] (*1944*) *45 N. L. R. 214.* [2] (*1929*) *10 C. L. Rec. 36.*
[3] (*1948*) *49 N. L. R. 333.*

under section 325 (1) of the Criminal Procedure Code, this being a summary charge". That the prosecuting Inspector himself understood the order in the same sense is apparent from the application he made to Court for a notice on the respondent to show cause why he should not be called up for conviction and sentence, which could only have been done if the bond had been taken under section 325. That the accused himself understood the order in the same sense is obvious from the fact that neither he nor his proctor showed cause against his being convicted and sentenced in this case in view of his subsequent conviction.

But unfortunately, due to carelessness there can be little doubt, the bond that was taken by the learned Magistrate is one which conforms more to a bond required to be furnished under section 82, rather than to one under section 325, of the Criminal Procedure Code. It is in fact a bond not in conformity with the provisions of section 325, and cannot be availed of for the purpose of convicting or sentencing the respondent in this case. Counsel for the respondent concedes that this is so. In these circumstances, the application of the Attorney-General to direct the learned Magistrate to take action in conformity with the order of this Court is entitled to succeed.

I therefore allow the application of the Attorney-General and *pro forma* cancel the bond entered into by the respondent, and remit the case to the learned Magistrate for a bond to be taken in proper form in terms of section 325 of the Criminal Procedure Code.

Application allowed.