

1959

Present : Weerasooriya, J.

A. PARAMALINGAM, Petitioner, and THE ATTORNEY-GENERAL
and another, Respondents

*S. C. 383—Application for the Re-transfer of M. C. Kayts,
Case No. 7,677 from the Magistrate's Court, Colombo, to the
Magistrate's Court, Kayts*

Fiat issued by Attorney-General transferring a case from one court to another—Application for re-transfer by an aggrieved party—Meaning of expression "any party considering himself aggrieved"—Power of Supreme Court to examine matter fully—Courts Ordinance (Cap. 6), ss. 42, 43—Criminal Procedure Code, ss. 135, 338.

In an application under the proviso to section 43 of the Courts Ordinance for the re-transfer to the Magistrate's Court, Kayts, of a case the trial of which the Attorney-General, acting under the main provisions of that section, had by his fiat transferred to the Magistrate's Court, Colombo—

Held, (i) that the expression "any party considering himself aggrieved" in the proviso to section 43 of the Courts Ordinance is not restricted to a party on record, that is to say, either the accused or the person who is formally the complainant. Accordingly, where the Police have filed a prosecution on a complaint made by a person, the latter (though not a party on the record) is a party within the meaning of the proviso and is entitled to move the Supreme Court for the re-transfer of the case.

(ii) that a re-transfer would be ordered by the Supreme Court if the Attorney-General adopts an attitude of silence in regard to the reasons that moved him to issue his fiat.

APPPLICATION for the re-transfer of M. C. Kayts, Case No. 7,677 from the Magistrate's Court, Colombo, to the Magistrate's Court, Kayts.

C. Thiagalingam, Q.C., with S. Sharvananda, for the petitioner.

Ananda Pereira, Crown Counsel, with V. S. A. Pullenayegam, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 21, 1959. WEERASOORIYA, J.—

This is an application under the proviso to section 43 of the Courts Ordinance (Cap. 6) for a re-transfer in M. C. Kayts, Case No. 7,677 the trial of which the Attorney-General, acting under the main provisions of that section, had by his fiat transferred to the Magistrate's Court of Colombo.

The case is one in which the Assistant Superintendent of Police, Jaffna, who is the 2nd respondent, acting on a complaint made by the petitioner, filed a report under section 148 (1) (b) of the Criminal Procedure Code charging Sub-Inspector Palipanai of the Kayts Police Station with voluntarily causing hurt to the petitioner, assault and using criminal force intending thereby to dishonour him, offences said to have been committed on the 27th June, 1958, and punishable under sections 314, 343 and 346 of the Penal Code. After trial the accused was found guilty of all the charges and sentenced to terms of imprisonment but in appeal the convictions and sentences were set aside by my brother Sinnetamby and he ordered a re-trial before another Magistrate.

The Attorney-General's fiat issued after the case had been sent back for re-trial. Mr. Thiagalingam, who appeared for the petitioner, submitted that in terms of the order of this Court the re-trial must be held in the Magistrate's Court of Kayts and the Attorney-General had no power, therefore, to transfer the trial to the Magistrate's Court of Colombo. I am unable, however, to see anything in the provisions of section 43 of the Courts Ordinance which expressly or by necessary implication takes away from the Attorney-General the power to issue a fiat of transfer after an order has been made in appeal by this Court that a re-trial should be held.

The proviso to section 43 allows "any party considering himself aggrieved" by the Attorney-General's fiat of transfer to apply to this Court for, *inter alia*, a re-transfer, and the substantial question that arises is whether such an application can be made by the petitioner. Learned Crown Counsel, while not denying that the petitioner may well be aggrieved by the fiat of transfer, contends that he does not come within the expression "any party", which expression, Crown Counsel submits, must be construed as meaning a party on record, that is to say, in the present case, either the accused or the 2nd respondent.

There appears to be no previous decision of this Court covering the particular question raised, but Crown Counsel relied on the judgment of Dalton, J., in *Babi Nona v. Wijesinghe*¹. The provision of law considered in that case was section 338 of the Criminal Procedure Code which confers a right of appeal on any person who is dissatisfied with any judgment or final order pronounced by a Magistrate's Court or District Court in a criminal case or matter *to which he is a party*. It was held that the injured person, in respect of hurt caused to whom a prosecution under section 315 of the Penal Code was instituted against the accused by the Police on a report filed in terms of section 148 (1) (b) of the Criminal Procedure Code, had no right of appeal against the order of the Magistrate referring the matter of the complainant to the Village Tribunal. The *ratio decidendi* was that "party" in section 338 denotes a party to the proceedings and, therefore, only the Sub-Inspector of Police who instituted the proceedings, or the accused, had a right of appeal under that section.

¹ (1926) 29 N. L. R. 43.

But, as Mr. Thiagalingam pointed out, a decision as regards the meaning of “ party ” in a particular provision of law is no criterion for determining the meaning of the same expression in a different provision of law. The expression is a comprehensive one the meaning of which would vary with the context in which it occurs. To cite one or two cases out of the innumerable decisions of the Courts in England on the point, in *Re Quartz Hill Gold Mining Co., Ex Parte Young*¹, the expression “ any party ” in section 40 of the Chancery Amendment Act, 1852, was equated to “ any person ”, but in *Smith vs. Darlow*², the expression “ parties ” in section 17 of the Common Law Procedure Act, 1860, was held to denote only litigant parties.

Even where the word “ party ” occurs in different contexts in the same statute it does not necessarily bear the same meaning. There are sections of the Courts Ordinance where the word appears to be used in the sense of a party to the case (sections 73, 78, 79, 88, 89). But I am unable to regard this as a reason for assigning the same meaning to “ party ” in section 43.

Generally speaking, the word “ party ”, when used with reference to the binding effect of a judgment of a Court of law, would indicate only a party to the case. Likewise, when there is statutory provision for an appeal, by availing himself of which a “ party ” is afforded an opportunity of being relieved from the binding effect of the judgment appealed from, there would be reason for the view that “ party ” in that context means a party to the case, as was held in *Babi Nona v. Wijesinghe (supra)*. But in issuing a fiat of transfer under section 43 of the Courts Ordinance the Attorney-General acts in an administrative capacity only. There is no person or “ party ” whose objections he need consider before taking such a step. I do not think that the proviso to section 43 can be regarded as allowing a right of appeal from a judicial or quasi-judicial act of the Attorney-General in issuing a fiat of transfer.

Section 43 immediately follows certain provisions (section 42) where under this Court is given, *inter alia*, wide powers for the transfer of pending cases. Section 42 provides that any transfer shall be made after application by motion, supported by affidavit, setting out the grounds on which it is based. It would seem that such application is not restricted to a party to the case and may, therefore, be made by the virtual complainant.

Section 526 of the Indian Criminal Procedure Code contains provisions analagous to section 42 of the Courts Ordinance for the transfer by the High Court of pending cases. Sub-section (3) of section 526 provides that the High Court may act either on the report of the lower Court, or on the application of a “ party interested ”, or on its own initiative. Sub-section (8) as it originally stood referred to the Public Prosecutor, the

¹ (1882) 21 Ch. D. 642.

² (1884) 26 Ch. D. 605.

complainant or the accused as the persons competent to move a Court, before which the trial or appeal is pending, for a postponement or adjournment so as to enable an application being made to the High Court for a transfer of the proceedings. But by a subsequent amendment there were substituted for the words "the Public Prosecutor, the complainant or the accused" in sub-section (8) the words "any party interested". In *Sardar Shah v. Gurdit Singh and Others*¹, a Judge of the Lahore High Court sitting alone (Haidar, J.) held that where the Police had filed a prosecution on a complaint made by a person, the latter (though not a party on the record) is a party interested within the meaning of section 526 (3) and is entitled to move the High Court in certain circumstances for a transfer of the case. It would appear, however, from the cases discussed in the judgment of Haidar, J., that judicial opinion is not uniform on the point in the different Indian High Courts. In *Om Radhe v. Emperor*², it was held that a witness, on whose information the prosecution had been filed by the Police, was a party interested within the meaning of section 526 (8). These cases seem to be more directly in point than the case of *Babi Nona v. Wijesinghe* (*supra*) relied on by learned Crown Counsel.

In the absence of anything in the context which would justify a restricted meaning being given to "party" in the proviso to section 43 of the Courts Ordinance, I hold that it is competent for the petitioner, as the virtual complainant in the case, to make this application for a re-transfer.

The next question that arises is whether good cause has been shewn why the application should be granted. The petitioner has set out several grounds in his application none of which, however, can be regarded as very convincing. Mr. Thiagalingam did not press the application on any of those grounds. But he urged that no material whatever had been placed before this Court by the Attorney-General for a departure from the rule stated in section 135 of the Criminal Procedure Code that every offence shall ordinarily be tried by a Court within the local limits of whose jurisdiction it was committed, and for that reason alone he asked that his client's application be allowed. Crown Counsel submitted, on the other hand, that the Attorney-General having already issued his fiat of transfer, the burden is on petitioner to make out a case for a re-transfer.

The proviso to section 43 of the Courts Ordinance specially provides for notice being given to the Attorney-General of an application under it so as to enable him, if he thinks fit, to show cause against it. Except for a statement made from the Bar by Crown Counsel at the hearing of the application, that the fiat was issued on representations contained in a

¹ A. I. R. 1934 Lahore 612.

² A. I. R. 1939 Sind 238.

petition sent by the accused, no cause on the merits has even been attempted to be shewn by the Attorney-General against the present application. If the petition which the accused is said to have addressed to the Attorney-General contained any ground or grounds which made out a *prima facie* case for a transfer of the trial I do not see why those grounds should have been withheld from this Court. As stated by Drieberg, J., in *The King v. Ludowyke*¹, where the Attorney-General has directed a transfer and an application has been made under the proviso to section 43 for a re-transfer, the matter is open to the fullest examination by this Court. But as a result of the attitude of silence adopted by the Attorney-General in regard to the reasons that moved him to issue his fiat, the position is simply this : that no cause has been shewn against the petitioner's application. I would, accordingly, allow the application and direct that the trial be re-transferred to the Magistrate's Court of Kayts. It is to be hoped that the trial will now take place without further delay.

Before I conclude I wish to state that this application was originally argued before me on the 24th and 25th September, 1959, and thereafter I reserved my order. A few days later Crown Counsel brought to my notice that with effect from the 25th September, 1959, the operation of the proviso to section 43 of the Courts Ordinance was suspended by Regulation 47 (4) of the Emergency (Miscellaneous Provisions and Powers) Regulations which had been brought into force on that day. I thereupon had the matter listed for further hearing, which took place on the 29th October, 1959. At that hearing Mr. Thiagalingam challenged the validity of Regulation 47 (4) on various grounds, and in view of the importance of the questions raised I referred the application to the decision of a fuller Bench. The application was accordingly listed before a Bench of three Judges on the 3rd December, 1959, but it became unnecessary to decide those questions as the Proclamation under section 2 of the Public Security Ordinance, No. 25 of 1947, by virtue of which the Emergency (Miscellaneous Provisions and Powers) Regulations were in force was revoked on the same day, and Counsel on both sides were agreed that the application could be dealt with by me on the basis of the arguments on which I originally reserved my order.

Application allowed.

¹ (1935) 36 N. L. R. 397.