1967 *Present :* **T. S. Fernando, A.C.J. Sirimane, J., and Siva Supramaniam, J.**

W. K. D. PREMASIRI, Appellant, *and* THE ATTORNEY-GENERAL, Respondent

S. C. 401 of 1967—Application under Section 31 of the Courts Ordinance for bail in M. C. Colombo, 37693/C

Courts Ordinance (Cap. 6)—Section 31—Admission to bail thereunder—Service of indictment on prisoner not a condition precedent—" Might properly be tried ".

The relevant part of section 31 of the Courts Ordinance is as follows :—

" If any prisoner committed for trial before the Supreme Court for any offence shall not be brought to trial at the first criminal sessions after the date of his commitment at which such prisoner might properly be tried (provided that twenty-one days have elapsed between the date of the commitment and the first day of such criminal sessions), the said court or any Judge thereof shall admit him to bail, unless good cause be shown to the contrary, or unless the trial shall have been postponed on the application of the prisoner. "

Held, that it is not essential that the prisoner should be served with a copy of the indictment before he can become entitled to be admitted to bail by virtue of the provisions of the Section.

Mendis v. The Queen (66 N. L. R. 502) overruled.

APPLICATION for bail under section 31 of the Courts Ordinance. This application was referred to a Bench of three Judges in terms of section 48 of the Courts Ordinance.

Nihal Jayawickrama, for the applicant.

V. S. A. Pullenayegum, Crown Counsel, with *Ranjit Abeysuriya*, Crown Counsel, for the respondent.

Cur. adv. vult.

December 5, 1967. T. S. FERNANDO, A.C.J.—

This matter comes before us as a result of a question of law being reserved in terms of section 48 of the Courts Ordinance for the decision of more than one judge of this Court. Alles J., before whom the matter was first taken up, reserved the question of law in view of two recent conflicting decisions both of which will be noticed later.

1*—10988—2,130 (1/68)

Proceedings were instituted in the Magistrate's Court, Colombo, against the applicant and three others on a complaint by the Police that alleged that on or about October 8, 1966, they committed the offence of murder by causing the death of one Chandrapala, an offence punishable under section 296 read with section 32 of the Penal Code.

After a non-summary inquiry held by the Magistrate, the applicant was on February 18, 1967, committed to the Supreme Court for trial. The three other persons accused were discharged by the Magistrate.

After the date on which the applicant was so committed for trial, there was held for the Western Circuit two criminal sessions, one commencing on March 20, 1967, and the other on July 10, 1967. Yet another session (the current session) for this circuit commenced on October 12, 1967, and the applicant fears he may not be brought to trial even at this session for the reason that, although over nine months have elapsed since his commitment, he has hitherto not even had a copy of the indictment served on him. He was first remanded in custody in October 1966 and remains in custody to this day. He has thus been in custody already for over 13 months. He claims that he has a right under section 31 of the Courts Ordinance to be released on bail pending his trial.

The relevant part of the aforesaid section 31 is reproduced below :—

> " If any prisoner committed for trial before the Supreme Court for any offence shall not be brought to trial at the first criminal sessions after the date of his commitment at which such prisoner might properly be tried (provided that twenty-one days have elapsed between the date of the commitment and the first day of such criminal sessions), the said court or any Judge thereof shall admit him to bail, unless good cause be shown to the contrary, or unless the trial shall have been postponed on the application of the prisoner ".

Neither counsel who appeared before us has been able to find any reported case where before the year 1940 this section has been the subject of judicial interpretation, a feature strongly indicative, in my opinion, of the absence of any serious delay up to that time in the disposal of criminal cases after date of commitment of prisoners for trial by the Supreme Court. The first reported case is one of the year 1940, two years after the introduction of the amendment of the Criminal Procedure Code by Ordinance No. 13 of 1938 whereby the system of direct committal for trial by inquiring Magistrates was substituted for the earlier system of committal on the instructions of the Attorney-General. In that case, *De Mel v. The Attorney-General*[1], Nihill J., dealing with an argument of Crown Counsel that the effect of the 1938 amendments would be to widen considerably the effect of section 31 of the Courts Ordinance unless the words " at which such prisoner might properly be tried " are taken to mean that time does not begin to run in a prisoner's favour until he has been served

[1] *(1940) 47 N. L. R. 137.*

with a copy of the indictment and two weeks (required by section 165F (3) of the Criminal Procedure Code) shall have elapsed thereafter, felt he did not consider himself justified in accepting it as valid. The learned judge there went on to observe that section 31 contains an important principle safeguarding the liberty of the subject who has a right to be brought to trial with reasonable despatch. He added that " it may be that the section is now more favourable to a prisoner in its application than formerly, but if that was not the intention of the Legislature the section could have been amended. Neither do I consider that the section in its application to the new procedure can be said to place a serious impediment in the path of the Crown. A period of three weeks is provided between the date of commitment and the first day of the Sessions. True if further evidence is required this may be too short a period in which to get it and to prepare and serve the indictment, but cases can be and are added to the calendar after a Sessions has begun ".

The liberty of the subject is an important personal right enjoyed in democratic communities observing the Rule of Law, and custody pending trial being an infringement of that liberty, the courts must be vigilant in ensuring that the infringement is restricted to the limits spelled out by the Legislature. The observations of Nihill J. reproduced above were quoted with approval by Gunasekara J. in a hitherto unreported decision of 8th March 1955 [1] where the learned judge dealt with the case of several prisoners whose trials could not be disposed of before the end of a particular criminal sessions of the Southern Circuit. Sansoni J. (as he then was) himself relied in the case of *Leon Singho v. Attorney-General* [2] on that part of the observations of Nihill J. which related to section 31 as embodying an important principle safeguarding the liberty of the subject. Gunasekara J. reverted to the subject in the case of *The Queen v. Mudiyanse* [3] when he observed that the mischief that is aimed at by the enactment (section 31) is the imprisonment for unduly long periods of accused persons awaiting trial.

Sansoni J. did not, however, in the case mentioned in the above paragraph refer to the other part of the observations of Nihill J. that rejected the argument that time does not begin to run in a prisoner's favour until he has been served with a copy of the indictment, but it is to be noted that he was dealing with a case where indictment had already been served. Another case, also decided by Sansoni J. some four years earlier, *The Queen v. Sunderam* [4], was relied on by the Crown in its argument before us, inasmuch as the learned judge has there observed that " once the indictment had been served on all the prisoners and fourteen days had elapsed, there was no further legal impediment in the way of the Crown in bringing this case to trial ". The argument before us was that the absence of an indictment was one of the legal impediments in the way of the Crown before the case can properly be tried within the meaning of section 31, but we must be careful not to read too much into the

[1] *S. C. Minutes of 8. 3. 1955.*
[2] *(1959) 62 N. L. R. at 223.*
[3] *(1961) 63 N. L. R. at 302.*
[4] *(1955) 60 N. L. R. 281.*

language employed by the learned judge there as that too was a case where indictment had been served long before the point that was decided there had arisen.

The earliest case which favours the view contended for by the Crown is that of *The King v. Girigoris Appuhamy* [1] in which Nagalingam A.J. (as he then was) held that in view of the amendment introduced to the Criminal Procedure Code in 1938 a prisoner could not have been properly tried at any sessions unless and until a fortnight had elapsed after the service of the indictment on him. That too was a case where at the time the question of bail was decided copy of indictment had long been served. A different view was taken in the later case of *The Queen v. Jinadasa* [2] where Gunasekara J. granting an application for bail in the case of two prisoners committed on 17th June 1957 for trial in the Southern Circuit held that the first session at which they could properly have been tried was the session that commenced for that Circuit on 16th Septembe 1957, notwithstanding the fact that indictment was served on them only on 2nd April 1958.

I could now turn to the two recent cases which apparently necessitated the reference of the question to this Divisional Bench. In *Mendis v. The Queen* [3], Manicavasagar J., dealing expressly with a case where indictment had not been served up to the date of his decision, considered the filing of an indictment and the service of a copy thereof on the prisoner as essential and necessary requirements before the prisoner "might properly be tried". Three years later, and barely five months ago, Samerawickrame J., in *Perera v. Attorney-General* [4], expressly disagreed with this interpretation placed upon section 31 by Manicavasagar J., and favoured a view which he thought was consonant with the views taken earlier by Nihill J. in *De Mel v. The Attorney-General* (*supra*) and by Gunasekara J. in *The Queen v. Jinadasa* (*supra*). In the last mentioned case Gunasekara J. had taken the view that prisoners could "properly be tried" at a criminal session held for the proper circuit, subject, I would add, to a modification necessitated by a lawful transfer of the trial from one circuit to another.

Samerawickrame J. stated (at page 524) that in deciding whether a prisoner should be admitted to bail under section 31, "a court must consider two questions : (1) has the prisoner not been brought to trial at a sessions held after he was committed by the Magistrate, (2) was that sessions one at which he could properly have been tried. In deciding the second question it seems to me that one must consider whether he could properly have been tried had he been brought to trial at it. It is therefore, in my view, not permissible to give as a ground for holding

[1] *(1946) 47 N. L. R. 499.*
[2] *(1958) 60 N. L. R. 125.*
[3] *(1964) 66 N. L. R. 502.*
[4] *(1967) 69 N. L. R. 522.*

that a prisoner could not properly have been tried at a sessions the omission to take a step involved in bringing the prisoner to trial, viz., the preparation and service of the indictment ".

We have had the advantage of a full argument by learned counsel appearing for the applicant and for the Crown and, after giving due weight to their arguments, I would respectfully agree with the opinions expressed by Samerawickrame J. that (1) the preparation and service of copy of the indictment on the prisoner is but a step involved in bringing the prisoner to trial, and (2) that a sessions at which a prisoner could have been tried, had he been brought to trial is a sessions at which he could properly have been tried. By way of an illustration, if I were to assume that a prisoner had been committed to trial on 1st February 1967, and indictment had been served on him on 25th February 1967, and the first sessions after committal commenced on 20th March 1967, that prisoner could have been brought to trial at the said sessions. If that was then the sessions contemplated in section 31, the omission to serve indictment does not render that sessions not the sessions at which the prisoner could have been properly tried.

This view first found favour with Gunasekara J. whose familiarity with the administration of the criminal law and procedure of this Country is well known and whose contribution to the development of that law and procedure is amply borne out in our law reports. Its confirmation by Samerawickrame J. in the recent judgment above noticed is further strengthened by a reference to an old Ordinance No. 15 of 1843, to which our attention was invited by learned counsel for the applicant. It is an Ordinance described as one providing in certain respects for the more efficient Administration of Justice in Criminal Cases and, as far as we can make out, section 37 thereof is the first legislative provision relating to the proper sessions at which a prisoner might be tried. That section is reproduced below in its entirety :—(The italicizing is mine)

"37. And it is further enacted, that if any prisoner committed for trial before the Supreme Court shall not be brought to trial at the first Criminal Sessions after the date of his commitment, *holden for the Circuit proper for the trial of such prisoner*, provided Twenty-one days have elapsed between the date of the commitment and the first day of such Criminal Sessions, he shall be admitted to bail, unless good cause be shown to the contrary. And if such prisoner is not brought to trial at the second Criminal Sessions of the Supreme Court holden for the said Circuit, after the date of his commitment, unless, by reason of the insanity or sickness of such prisoner, the Judge of the Supreme Court presiding at such last-mentioned Sessions, shall issue his order to the Fiscal for the discharge of such prisoner from his imprisonment for that offence for which he has been committed for trial."

Ordinance No. 15 of 1843 came into force on the 8th November of that year, and six days earlier, viz., on 2nd November 1843, by section 1 of Ordinance No. 9 of 1843 provision was made for the division of the Island of Ceylon into three or more Circuits in place of the provision introduced by the Charter of 1833 dividing the Island into the District of Colombo and the Three Circuits therein named. The terms of section 37 above reproduced indicate clearly enough that the first sessions and the second sessions specified therein refer to sessions having territorial jurisdiction over the trial of the offence. A close comparison of it with section 31 of the Courts Ordinance in its present form will show that it has not been subjected to any material amendment in spite of the passage of nearly 125 years.

Learned counsel for the Crown submitted, quite correctly, if I may say so, that no person can be tried at any sessions unless an indictment has in fact been presented. He referred us to the language employed in section 281 of the Criminal Procedure Code of 1883 (Ordinance No. 3 of 1883), viz., that the " indictment shall be the foundation of the trial in the Supreme Court ", and contended that one cannot contemplate a session existing at which a prisoner might properly by tried until such time as the foundation can be laid for the trial. I think this was but another way of formulating the very argument which was rejected in 1940 by Nihill J., a rejection which was endorsed in 1955 by Gunasekara J., and in 1967 by Samerawickrame J. Crown Counsel invited us also to consider two consequences that may arise by acceding to the argument on behalf of the applicant. He first referred us to the powers reserved to the Attorney-General by section 389 of the Criminal Procedure Code to order a supplemental inquiry at which further evidence might be recorded. Apart from observing that this point too was in the mind of Nihill J. when he decided the case above referred to, I do not consider that any order of the Attorney-General under the said section can affect the plain interpretation of the expression " the date of his commitment " contained in section 31 of the Courts Ordinance. Samerawickrame J. in *Perera v. Attorney-General* (*supra*) thought that a case where the Attorney-General has exercised his powers under section 389 after commitment would be one in which the Crown could resist an application for bail in terms of section 31 of the Courts Ordinance as there would then be good cause to the contrary. I would myself endorse this observation subject to the qualification that such a situation may, but not necessarily would, constitute good cause against the granting of bail. Crown Counsel next invited us to consider what would happen where the Attorney-General, as he lawfully might do, sends an indictment to the District Court instead of to the Supreme Court to which the accused has been committed by the Magistrate. It was a little difficult to appreciate what force this second argument of Crown Counsel could carry because, apart from the fact that most offences triable by a District Court are bailable offences, section 31

can have no operation except in respect of cases of prisoners awaiting trial by the Supreme Court. Therefore, where an accused person who had been committed by a Magistrate for trial by the Supreme Court has, by the act of the Attorney-General, been called upon to face his trial in the District Court, he has ceased to be a person awaiting trial in the Supreme Court. The consequences contemplated by Crown Counsel do not, in my opinion, militate against the granting of the application for bail made in the instant case.

The applicant has, in my opinion, established that he is entitled to the right conferred on him by section 31 of the Courts Ordinance. No affidavit has been filed on behalf of the prosecution nor has any attempt been made to show other good cause. We have therefore made order that the Magistrate do admit the applicant to bail in such sum as may be fixed by the Magistrate and subject to such conditions as it may seem fit to him to impose.

I might add that we were informed by counsel that the Attorney-General is seeking in some other proceeding the intervention of this Court in an attempt to reverse the order made by the Magistrate discharging the other accused in this case. We cannot say how long the proceedings so set in motion by the Attorney-General may take before they are terminated. They cannot, however, affect the right of the applicant before us. After the date of his commitment two sessions of the Western Circuit have been commenced and terminated. He has now been in custody remanded pending trial for well over a year. Nothing catastrophic can ensue from his release on bail. A Court has undoubted right to cancel bail where it is shown that the right to release on bail has been or is being abused. We venture to think that the granting of this application may in some measure induce a speedier disposal of the criminal proceedings against the applicant and the other accused and, indeed, act as a spur to all concerned in the disposal of cases of remand prisoners filling our gaols in our common duty of eradicating the lethargy that is currently afflicting us. The liberty of the subject is not a slogan as was suggested, cynically so it appeared to us, during the argument, but is a valuable right of a citizen, and the courts must be vigilant in ensuring that it is not unprofitably thwarted.

SIRIMANE, J.—I agree.

SIVA SUPRAMANIAM, J.—I agree.

Application allowed.