1956 *Present :* Gunasekara, J., and Sinnetamby, J.

THE QUEEN *v.* L. B. KOLUGALA

S. C. Application 297—M. C. Kandy 7,535/D. C. 613

Application to set aside the order of the Additional District Judge, Kandy, releasing the accused on bail and to direct that the accused be arrested and committed to custody

Bail—Order made by District Judge granting bail—Remedy of Crown.

Where an order admitting an accused to bail is made by a District Judge without objection on the part of the Crown although the Crown is represented, the fact that no objection was taken is relevant to the question whether the Supreme Court would interfere with the order by way of revision and direct the accused to be arrested and committed to custody.

Where the Crown is dissatisfied with an *ex parte* order for bail made by a District Judge in the absence of the prosecution, its proper remedy is to make an application to the District Judge himself to set aside his order.

APPLICATION for the revision of an order made by the District Court, Kandy.

A. C. Alles, Crown Counsel, with *V. S. A. Pullenayegum*, Crown Counsel, and *E. H. C. Jayetileke*, Crown Counsel, for the Attorney-General, in support.

Colvin R. de Silva, with *B. S. C. Ratwatte* and *S. Rajaratnam*, for the accused, respondent.

August 3, 1956. GUNASEKARA, J.—

This is an application for the revision of an order made by the District Court of Kandy admitting the accused-respondent to bail. The accused, who is a proctor, was committed for trial before the District Court of Kandy on charges of two offences punishable under Section 403 of the Penal Code, in respect of payment orders for Rs. 11,727 and Rs. 29,318·25, respectively, and two offences punishable under Section 459 of the Penal Code read with Section 456 of that Code. The trial was fixed for the 2nd July and several succeeding dates. The accused, who had entered into a personal bond to appear for trial, failed to appear on the 2nd July and sent no excuse to the court. The district judge issued a warrant for his arrest returnable forthwith, but later extended the returnable date to the 17th July. The warrant was not executed by the 17th July and it was reissued, returnable on the 5th September 1956. On the 25th July the accused surrendered to the court and his counsel made an application for bail. The district judge made order admitting him to bail in a sum of Rs. 25,000 with one surety. It is this order that we are now asked to revise.

The order also refers to an application by the crown proctor to have the case fixed for trial on the 30th and 31st July. The district judge heard a submission made by the accused's counsel on that application and directed that the accused should appear on the 30th July. The application was one that had been filed by the crown proctor on the 20th July. He stated there that he had been instructed by the Attorney-General to move that this case be fixed for trial on the 30th and 31st July because a connected case had been fixed for those two dates and the witnesses in both cases were the same. The order made upon that application was "Submit to A.D J. when accused surrenders". The learned crown counsel states from the Bar that the crown proctor was present in court when the accused surrendered on the 25th July and that the circumstances in which he came to be there were that the district judge ha l sent him a message asking him "to be present in court in connection with the motion that he had presented on the 20th July".

When the accused surrendered to the court, his counsel tendered a document purporting to be a medical certificate to the effect that the accused had been ill with acute gastritis on the 1st and 2nd of July and was under the treatment of a doctor who had advised him to rest on those two days. The medical certificate is dated the 14th July. The ground on which this court is asked to revise the district judge's order is that the Crown had no opportunity of making its submission on the accused's application for bail or his representation that he had been ill on the 1st and 2nd of July. The learned crown counsel contends that the fact that the crown proctor was present in court on the 25th July "in connection with his application of the 20th July" does not imply that the Crown had an opportunity of opposing the application for bail.

When a criminal case is fixed for trial the court must also make an incidental order as to whether or not the accused is to be committed to custody. I should have thought therefore that when the crown proctor made an application on behalf of the Crown that the case should be fixed for trial on the 30th and 31st July he also had authority to speak for the Crown on the question whether the accused should be remanded to custody. If he had no sufficient instructions on that point he could have asked for an adjournment of the hearing of the application for bail. Although he was present for the express purpose of assisting the court when his application regarding the fixing of a date of trial was considered, he made no submission on the question whether the accused should be admitted to bail.

If the crown counsel is right in his contention that the order for bail was an *ex parte* order, then it seems to me that the proper procedure for the Crown to adopt would be to make an application to the district judge himself to set aside his order. If it was not an *ex parte* order, then it was one which was made without objection on the part of the Crown although the Crown was represented, and the fact that no objection was taken is relevant to the question whether this court should

interfere with it by way of revision. What the learned judge has done is to require bail from an accused person who was not on bail but had merely entered into a personal bond undertaking to appear at the trial. The accused has now been required to enter into a recognizance in a sum of Rs. 25,000, which is an unusually large sum, and to find a surety. I am unable to say that the learned district judge has failed to give his mind to any question that ought to have been considered or that there has been such a gross error in the exercise of his discretion that this court ought to revise his order. I would therefore refuse the application.

SINNETAMBY, J.—I agree.

Application refused.