1947 *Present :* **Dias J.**

CALDERA, Petitioner, *and* S. I. POLICE, WELIKADA, Respondent.

191—Application for bail in M.C., Colombo, 24,438.

Bail taken in respect of bailable offence—Failure of accused to appear on due date—Power of court to cancel bail—Criminal Procedure Code, ss. 394, 399, 400.

Where a person who is accused of a bailable offence and has been released on bail fails to attend at the time and place mentioned in the bond the Court has no jurisdiction *ex mero motu* to cancel the bail. The Court should, in such case, proceed as provided by section 399 of the Criminal Procedure Code.

Held, further, that an accused who gives bail passes from the custody of the Court to the custody of the surety. It is open to the surety under section 400 of the Criminal Procedure Code at any time to apply to the Court to be released from his obligation. In such a case if the accused does not furnish fresh bail, he will be remanded in custody.

APPLICATION for bail.

M. E. Dharmawardene (with him *S. Saravanamuttu*), for the petitioner

Boyd Jayasuriya, C.C., for the Attorney-General.

Cur. adv. vult.

[1] See also *de Silva v. Siriwardene (1946) 47 N. L. R. at page 490 footnote 4.*
[2] *(1923) 1 Times of Ceylon L. R. 212.*

May 22, 1947. DIAS J.—

The facts are as follows :

The petitioner was charged with committing mischief under section 410 of the Penal Code and with committing criminal intimidation under section 486 of the Penal Code. The petitioner appeared on summons on February 14, 1947, and was admitted to bail in a sum of Rs. 250. Thereafter, it was objected that the second charge was non-summary whereas the first charge was summary. There appears to be no objection to a summary and non-summary offence being dealt with non-summarily, but the private counsel appearing with the Police moved to withdraw the charge under section 486. For some reason which is not clear, the Magistrate acceded to an application by the defence for a date.

On that date the petitioner was absent and sent a medical certificate and a further date for April 17 was allowed. On that date a second medical certificate was filed from an ayurvedic physician. This certificate was impugned on the ground that whereas the certificate stated that the petitioner was unable to leave his bed, he was reported to have been seen on the road. Thereupon the Magistrate issued a warrant and noticed the surety. On April 21 the petitioner surrendered. On May 1 the Magistrate took certain steps against the physician who issued the certificate. That individual stated that he had not issued the certificate to this petitioner but to some other. Thereupon the Magistrate made order " I cancel the accused's bail ".

It is argued that under section 394 of the Criminal Procedure Code, the Magistrate under no circumstances his power to cancel the bail of a person accused of a bailable offence. Counsel went to the extent of arguing that even if it was proved that the accused had contumaciously or fraudulently kept away from Court by sending a false medical certificate, his bail could not be cancelled if he was charged with a bailable offence.

As this is a somewhat startling situation, it is necessary to examine the provisions of the Criminal Procedure Code closely.

It is undoubtedly correct that under section 394 when any person charged with a bailable offence appears or is brought before the Court and is prepared to give bail at any stage of the proceedings, such person *shall* be released on bail, unless the Court thinks fit to release him on his personal bond. That provision has been observed in this case.

The form of the bond to be executed is provided by section 397 of the Code as amended by Ordinance No. 13 of 1938. One of the conditions of the bond is that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend unless otherwise directed. The bond given by the petitioner and his surety contains that condition.

Section 398 provides that as soon as the bond is executed, he must be released. Where there is a surety, he passes from the custody of the Court into the custody of the surety. Section 400 shows that it is open to the surety at any time to apply to the court to be released from his obligation. In such a case unless the accused gives fresh bail, he will be remanded in custody.

Then comes section 399 which reads as follows: "If through mistake, fraud or otherwise insufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it, and may order him to find sufficient sureties and on his failing to do so, may commit him to prison".

If, therefore, on May 1, 1947, the Magistrate formed the view, as he appears to have done, that the petitioner by his conduct had committed a breach of his bond in not attending Court on April 17, he might have proceeded to exact the penalty on the bond from the surety and the accused under the provisions of section 411, and he may at the same time acting under section 399 have called upon the petitioner to find sufficient sureties and if he failed to do so, it was open to the Magistrate in his discretion to commit the petitioner to prison. He had no jurisdiction *ex mero motu* to cancel the bail with the result that the petitioner would be automatically remanded in custody.

I see no reason why I should order that the accused should be enlarged on bail. I set aside the order of the Magistrate dated May 1, 1947, cancelling the bail of the petitioner. The Magistrate will proceed as provided by section 399 of the Criminal Procedure Code, if he is minded to do so.

Order set aside.