1917.

[IN REVISION.]

Present: Shaw J.

ALLES *v.* PALANIAPPA CHETTY.

P. C. Colombo, 5,361.

Fugitive offender—Warrant for arrest—Offence committed by person residing out of Ceylon—Revision—Writ of prohibition.

To render a person liable to be apprehended under the Fugitive Offenders Act there must be an offence committed in some part of His Majesty's dominions, and subsequent to the offence the offender must have left that part.

The provisions for apprehension do not apply to a person who in one part of His Majesty's dominions commits an offence in, or abets the commission of an offence in, another part, and who was not in that part at the time of the offence, and has not since been there. Such a person can, in general, be prosecuted for the offence in that part of His Majesty's dominions in which he was when he committed the offence, and if it is more convenient that he should be removed for trial to another part, he can be so removed under the provisions of section 35 of the Act.

The powers of revision given to the Supreme Court by sections 21 and 40 of the Courts Ordinance are very wide and general; they might be exercised in respect of non-summary proceedings.

THE facts are set out in the judgment.

Bawa, K.C. (with him *Tisseverasinghe*), for petitioner.—This is not a case to which the Fugitive Offenders Act, 44 and 45 Vict., c. 69, applies. The accused is not a "fugitive offender" within the meaning of section 2 of the Act (*14 Halsbury, s. 987, p. 421*).

R. v. Nellins [1] is a decision on the Extradition Acts, 33 and 34 Vict., c. 52, and 36 and 37 Vict., c. 60. Section 26 of 33 and 34 Vict., c. 52, does not require that the offender should have left the jurisdiction within which he committed the offence to become amenable to extradition; whereas section 2 of the Fugitive Offenders Act, 44 and 45 Vict., c. 69, makes it a condition precedent to the issue of the warrant for the arrest of the offender.

The application for the warrant is not made *bona fide* (see section 19 of the Fugitive Offenders Act). A number of civil actions are pending against the accused at the instance of the complainant, and in one case judgment had been obtained, and it is now pending in appeal. The accused has denied his liability to pay the several claims. The application will cause grave prejudice to his appeal and to his defence in the pending cases. This is an attempt with

[1] *58 L. J. M. C. 157.*

the indirect object of bringing the accused within the jurisdiction of the District Court of Colombo so as to make him amenable to arrest in the civil actions. To obtain a warrant for that purpose is an abuse of the process of the Court. (*Pooley v. Witham.*[1])

The warrant has been irregularly issued, as the procedure under the Act has not been followed. See English Home Office Circular dated February 4, 1882, quoted in Kirchner's book on "Fugitive Offenders." See also *Ceylon Government Gazette* Supplement No. 5,005 dated July 18, 1890, pages 1-16, and also *Ceylon Government Gazette* No. 4,830 dated December 16, 1887, page 2922.

[SHAW J.—These are mere instructions, and have not the force of law.]

They are published for the guidance of Magistrates.

Counsel also referred to Ceylon Ordinance No. 10 of 1877, Orders in Council published in the *Ceylon Government Gazette* No. 4,826 dated August 12, 1878, page 800, and January 22, 1886, page 108, to *Julius Kaufmann's Case*,[2] and *R. v. Jacobi.*[3]

On the merits counsel contended that no offence had been committed.

Morgan de Saram (with him *Jayatileke*), for respondent.—An application for a writ of prohibition, and not for revision, is the proper proceeding. The powers of the Supreme Court in revision are contained in section 356 of the Criminal Procedure Code, and are limited to cases "already tried or pending trial," and the present is not one of these cases. This is a non-summary case. Where prohibition lies, appeal and revision are out of place, and should not be allowed (see S. C. 69—P. C. Chilaw, 660).[4] The decision in *R. v. Nellins* [5] applies to this case. An offence having been committed within the jurisdiction of the Colombo Police Court, the physical presence of the offender there at the time of the commission of the offence is not necessary to bring him within the provisions of the Fugitive Offenders Act. Besides, the accused has not appeared before the Police Court of Colombo, and it is not, therefore, open to him at this stage to raise any objections to the proceeding. He may raise them when he is arrested and brought before the Foreign Court.

Counsel argued on the merits of the case.

Bawa, K.C., in reply.—The Supreme Court has wide powers under sections 21 and 40 of the Courts Ordinance, 1889, and can interfere in every case of an improper order being made by an inferior Court. So held recently in case No. 6,143, P. C. Colombo.[6] Section 356 of the Criminal Procedure Code does not, and cannot, limit the powers of the Supreme Court, for section 5 of the same

[1] *50 L. J. (N. S.) Eq. 236.*
[2] *2 S. C. C. 124.*
[3] *46 L. T. R. 595.*
[4] *S. C. Min., Jan. 26, 1916.*
[5] *53 L. J. M. C. 157.*
[6] *S. C. Min., Jan. 23, 1917.*

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Code enacts that "nothing in this Code shall be considered as derogating from the powers or jurisdiction of the Supreme Court or of the Judges thereof."

Besides, section 356 of the Criminal Procedure Code, 1898, is a re-enactment, almost word to word, of section 753 of the Civil Procedure Code, 1889, and the words "whether already tried or pending trial" cannot, therefore, have the restrictive meaning contended for by respondent's counsel.

[Mr. de Saram pointed out that the old Criminal Procedure Code, No. 2 of 1883, had the same words.]

Writ of prohibition does not lie, as the Magistrate has not acted without jurisdiction (6,143—P. C. Colombo and *In re Villavarayen* [1]).

Accused need not appear in person, and can be represented by a pleader (sections 154 and 287 of the Criminal Procedure Code). The Supreme Court can exercise its powers of revision of its own motion.

Cur. adv. vult.

February 20, 1917. SHAW J.—

This is an application for the exercise of the powers of the Supreme Court in revision in regard to the proceedings in the Police Court of Colombo in this case, and in particular in regard to the issue by the Magistrate of a warrant for the arrest of the petitioner under the Fugitive Offenders Act, 1881.

On November 13, 1916, a complaint was made by Francis Joseph Alles, Chief Cashier and Guarantee Shroff of the Chartered Bank, Colombo, against the petitioner for cheating under section 400 of the Penal Code.

The facts disclosed by the evidence in support of the charge are as follows:—

The petitioner, who resides in India, carried on business there and in Colombo in partnership with his brother, Narayanan Chetty, under the *vilasam* M. M. P. L., the business of the firm in Colombo being managed by their agent and attorney, Muttiah Chetty, who held their power of attorney dated December 16, 1911.

Acting under this power of attorney, Muttiah Chetty from time to time borrowed from the Chartered Bank considerable sums of money on behalf of the firm of M. M. P. L.

In October, 1915, the petitioner visited Colombo and had an interview with Mr. Alles. At this time the firm was indebted to the bank in the sum of Rs. 39,950 in respect of bills discounted. The petitioner informed Mr. Alles that the firm had a good business and a lot of property in India, and asked him to go on lending them money, and said he would guarantee payment.

In December, 1915, after the petitioner had returned to India, his brother Narayanan Chetty died; at this time over Rs. 61,000 was owing from the firm to the bank.

[1] *(1908) 7 N. L. R. 116.*

No notice was given by the petitioner or by Muttiah Chetty to the bank of the death of Narayanan Chetty, and the bank continued discounting bills drawn by Muttiah on behalf of the firm up to September 6, 1916, at which date the amount due to the bank was Rs. 42,350. The bank then sued the petitioner and Narayanan on a promissory note in case No. 45,463 in the District Court, Colombo, and the petitioner set up as a defence that the firm had been dissolved by the death of his brother in December, 1915. This was the first intimation which the bank or Mr. Alles had received of his death.

Judgment has been obtained by the bank against the petitioner in that case, and an appeal has been lodged and is pending in this Court.

The cheating which is alleged against the petitioner, in the information before the Magistrate, is the failure to give notice to Mr. Alles or the bank of the death of Narayanan.

Two objections are taken on behalf of the petitioner to the warrant issued by the Magistrate: first, that the petitioner having been in India from the date of the alleged offence up to the present time he is not a fugitive within the meaning of the Act; and second, that the evidence before the Magistrate discloses no criminal offence, and the proceedings before the Magistrate and the application for the warrant are not *bona fide*, but for the purpose of attempting to enforce payment of a civil debt.

I am of opinion that the issue of the warrant was improper on the first of these grounds.

There is no definition of "fugitive" or "fugitive offender" in the Fugitive Offenders Act, 1881, and the ordinary meaning of fugitive offender is, of course, one who, having committed an offence in any place, flies from it to escape the consequences.

Section 2 of the Act specifies who the persons are who are liable to be apprehended under the provisions of the Act, and shows that the meaning of the word "fugitive" in the Act is intended to be the normal one. That section is as follows:—

> "2. Where a person accused of having committed an offence (to which this part of the Act applies) has left that part, such person (in this Act referred to as a fugitive from that part) if found in another part of Her Majesty's dominions shall be liable to be apprehended and returned in manner provided by this Act to the part from which he is a fugitive."

To render a person liable to be apprehended under the Act there must be an offence committed in some part of His Majesty's dominions, and subsequent to the offence the offender must have left that part; then if he is found in another part he may be apprehended and returned to the part from which he is a fugitive.

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The provisions for apprehension seem to me clearly not to apply to a person who in one part of His Majesty's dominions commits an offence in, or abets the commission of an offence in, another part, and who was not in that part at the time of the offence, and has not since been there. Such a person can, in general, be prosecuted for the offence in that part of His Majesty's dominions in which he was when he committed the offence, and if it is more convenient that he should be removed for trial to another part, he can be so removed under the provisions of section 35 of the Act.

On behalf of the respondent the case of *R. v. Nellins* [1] was cited. In that case the accused, while in England, sent letters containing alleged false pretences to persons in Germany, thereby inducing them to part with goods and deliver them to the order of certain persons in Germany. It was held by the Court that the accused was liable to be extradited to Germany.

The case, however, appears to me to be no authority in the present. The application there was under the Extradition Act, 1870, and depended upon the construction of that Act, the wording of which is entirely different to that of the Fugitive Offenders Act, 1881. It contains no provision similar to that contained in section 2 of the latter Act, which I have quoted above, and it contains in section 25 a definition of " fugitive criminal, " which embraces all persons who have committed an offence in a foreign state, whether they have been in that state or not.

Having come to the conclusion that the first objection to the issue of the warrant is a good one, it is unnecessary for me to discuss the second, and I do not think I should prejudice the decision of any further proceedings that may be taken by an expression of opinion with regard to it.

Objection was taken on behalf of the respondent to the present petition that proceedings for revision are inapplicable, and that the proper course for the petitioner to have taken was to have applied for a writ of prohibition against the Magistrate.

The powers of revision given to the Supreme Court by sections 21 and 40 of the Courts Ordinance are very wide and general, and in a very recent case, No. 6,143, P. C. Colombo,[2] the Chief Justice expressed his opinion that in a proper case they might be exercised in respect of non-summary proceedings. I do not think that section 356 of the Criminal Procedure Code was intended to or does restrict the general powers given by the Courts Ordinance to revise in a proper case any order made by an inferior Court in any proceedings of a criminal nature, whether the actual trial may or may not ultimately be before the Court, the order of which it is sought to revise.

That an application by way of revision will not generally be entertained when proceedings by way of appeal lie is well established, and it was contended that, as an application for a writ of prohibition

[1] *53 L. J. M. C. 157.*

[2] *S. C. Min., Jan. 28, 1917.*

might have been made in the present case, revision should be refused. In this connection I was referred to No. 660, P. C. Chilaw.[1] That case, however, was not an application for revision but an appeal, the contention being that the Magistrate had acted entirely without jurisdiction, and I expressed an opinion that the proper remedy was to have applied for a writ of prohibition. That case appears to me to have no bearing upon the present.

Whether proceedings for prohibition would lie in the present case at all is not very clear, the Magistrate having jurisdiction in a proper case to issue a warrant under the Act; but whether such proceedings lie or not, I think the Supreme Court has also jurisdiction under its powers of revision to rectify the order that has been made, and that this is a proper case for the exercise of the jurisdiction.

I accordingly direct that the order for the issue of the warrant under the Fugitive Offenders Act, 1881, for the arrest of the petitioner be set aside.

Set aside.