

1937

Present : Soertsz J.

CASSIM v. ABDURSAK.

126—P. C. Batticaloa, 44,904.

*Appeal—Conditional order of discharge—Not a final order—Criminal Procedure Code, ss. 325 (1) and 338 (1).*

There is no right of appeal from an order under section 325 (1) of the Criminal Procedure Code discharging an offender conditionally on his entering into a recognizance to appear for sentence.

*Anchapullai v. Baker* (31 N. L. R. 149) not followed.

*Culanthaivalu v. Somasundram* (2 Bal. 122) followed.

**A** PPEAL from an order of the Police Magistrate of Batticaloa.

In this case the accused who was found guilty of an offence under section 433 of the Penal Code was not convicted but was discharged conditionally on his entering into a recognizance in one hundred rupees to be of good behaviour and to appear for conviction within one year.

C. T. Olegasagarem, for complainant, respondent, takes preliminary objection.—An order of discharge made under section 325 (1) (b) of the Criminal Procedure Code is not appealable. It is only a conditional order and does not terminate the proceedings. It bears a close resemblance to an order made under section 88 of the Criminal Procedure Code. It was held by a Full Bench in *Culanthaivalu v. Somasundram*<sup>1</sup> that an order under section 88 is not appealable. In essentials, the effect of an order under section 325 (1) (b) is similar to that of an order made under section 88 (*King v. Ratnam*<sup>2</sup>). To come nearer the point, it has been expressly held that an order under section 325 (1) (b) is not appealable—*Sanders v. Pary*<sup>3</sup>; *Hadjar v. Charles*<sup>4</sup>. There is, however, a conflicting decision in *Anchapullai v. Baker*<sup>5</sup>, but in that case, certain decisions were followed where the ruling was only to the effect that when an accused is discharged and the complainant is referred to his civil remedy, the latter has a right of appeal.

L. A. Rajapakse, for accused, appellant.—*Culanthaivalu v. Somasundram* (*supra*) is not applicable to the present case because that was a decision relating to section 88 of the Criminal Procedure Code. It has been expressly decided fairly recently that an order under section 325 (1) (b) is appealable, *Anchapullai v. Baker* (*supra*), where an earlier decision was followed, viz., *Inspector of Police v. Fernando*.

*Cur. adv. vult.*

May 27, 1937. SOERTSZ J.—

Mr. Olegasagarem has taken the preliminary objection that there is no appeal from the order made in this case. The order was that the accused who was found guilty under section 433 of the Penal Code "is not convicted but is discharged conditionally on his entering into a recognizance in one hundred rupees with one surety to be of good behaviour, and to appear for conviction during a period of one year".

<sup>1</sup> (1904) 2 Bal. Rep. 122.

<sup>2</sup> (1928) 30 N. L. R. 212.

<sup>3</sup> (1904) 1 Bal. Rep. 22.

<sup>4</sup> (1926) 7 Law Rec. 161.

<sup>5</sup> (1929) 31 N. L. R. 149.

<sup>6</sup> (1929) 30 N. L. R. 482.

This order was made under section 325 (1) of the Criminal Procedure Code. But for certain local decisions, I should have reached, without much difficulty, the conclusion that there is no right of appeal from such an order. Section 338 (1) of the Criminal Procedure Code says, "any person who shall be dissatisfied with any judgment or *final order* pronounced by any Police Court . . . . in a criminal case or matter to which he is a party may prefer an appeal to the Supreme Court against such judgment for any error in law or fact" subject to the provisions of sections 335, 336, and 337. On the face of it an order discharging an offender conditionally on his entering into a recognizance to appear for sentence when called upon during a certain period, is not a final order. Such an order is not an unqualified discharge. It merely declares that in the opinion of the Court the charge against the accused has been proved, but without entering a conviction and awarding punishment, the Court postpones those matters. In the event of the conditions imposed by the recognizance being observed by the accused for the period stated, his discharge becomes absolute and I suppose, he is entitled thereafter to plead it as *Autrefois acquit* if he is confronted with the same charge. If, however, he violates any of the conditions of the recognizance, the occasion then arises for a conviction to be entered against him and for sentence to be passed on him. There is also the possibility that he may be discharged under section 326 (1) at any time during the period of the recognizance. On the occurrence of any of those three contingencies, it may be that a right of appeal accrues to the aggrieved party. But till then it cannot, in my opinion, be said that there is a final order. My attention has, however, been called to some conflicting decisions on this point. In the case of *Anchapullai v. Baker*<sup>1</sup> Lyall Grant J. said "It has been more than once held by this Court that there is a right of appeal from an order under section 325 (1) on the ground that it was a final order . . . . He referred to the case of *Inspector of Police v. Fernando*<sup>2</sup> in which Akbar J. following another judgment of Lyall Grant J. in *P. C. Dandagamuwa, Revision No. 670* (S. C. M. 31.10.28) to the same effect, held that where an accused person is warned and discharged the remedy open to the complainant is by way of an appeal. The case actually before Akbar J. was a different case from the present. He was dealing with an order warning and discharging the accused, and such an order may properly be regarded as a final order. Akbar J. in the course of his judgment referred to the cases of *Suppiah v. Loku Banda*<sup>3</sup> and *Schokman v. John*<sup>4</sup>, but in those cases too the ruling was that where a Police Magistrate refers the complainant to his civil remedy and discharges the accused, the complainant's remedy is to appeal under section 338. So that there are really only two judgments among those cited to me that deal directly with the question whether there is an appeal from an order under section 325 of the Criminal Procedure Code, and both those are judgments of Lyall Grant J. On the other hand there are several cases in which it was held that an order under this section is not an appealable order. In *Sanders v. Pary*<sup>5</sup>, Moncrieff A.C.J. considered

<sup>1</sup> 31 N. L. R. 149.

<sup>2</sup> 30 N. L. R. 482.

<sup>3</sup> C. W. R. 127.

<sup>4</sup> 4 C. W. R. 93.

<sup>5</sup> *Bal. Reports* 22.

the question carefully and held that an appeal does not lie. Then in the case of *Culanthaivalu v. Somasundram*<sup>1</sup>, the Full Bench (Layard C.J., Moncrieff and Middleton JJ.) held that an order made under section 88 of the Criminal Procedure Code requiring a person to execute a bond to be of good behaviour for a certain period is not a final order and no appeal lies from it. The reasoning in that case is applicable to this. A final order is an order which terminates the case. The order made in this case does not terminate it. Under section 326 (c) of the Criminal Procedure Code, the Court may vary the condition of the recognizance, and may . . . discharge the recognizance. Again under section 327 (4) the Court on being satisfied that . . . has failed to observe any condition of his recognizance may without any further proof of his guilt convict and sentence him for the original offence. So that the case is still pending and that fact necessarily implies that there has been no final order. I would, therefore, sustain the preliminary objection and dismiss the appeal. I would add that if I had to consider the appeal on its merits, the result would not have been different.

*Appeal dismissed.*

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