1968 *Present :* Weeramantry, J.

S. RAJU, Petitioner, *and* R. A. JACOB (Inspector of Police, Kotahena), Respondent

S. C. 64/68—Application in Revision in M. C. Colombo, 16037/B

Sentence—Stay of hard labour pending an application in revision— Delay in communicating to the prison authorities the order dismissing the application in revision—Quantum of relief which the prisoner may be granted—Criminal Procedure Code, s. 341.

The petitioner, who had been sentenced to a term of one year's rigorous imprisonment, did not appeal against the order of the Magistrate but made an application in revision. The Supreme Court ordered that hard labour be stayed from 19th July 1967 till the disposal of the application. When the application was subsequently dismissed on 14th September 1967 the Court made no order regarding resumption of hard labour as the fact that hard labour had been stayed was not brought to its notice. Further, on account of the delay, through oversight, in the communication to the prison authorities of the order dismissing the application in revision, hard labour was not resumed until 30th October 1967.

It was contended on behalf of the petitioner that the entire period during which he was kept on remand without hard labour should be deducted from the term of one year's rigorous imprisonment imposed on him.

Held, that, in regard to the period between the stay of hard labour and the dismissal of the application in revision, it would meet the ends of justice if one month out of this period was reckoned as part of the term of the sentence. The silence of the Criminal Procedure Code on such a matter cannot take away from the inherent powers of the Court to grant, to an applicant in revision, relief of the nature contemplated by section 341 (5) which deals with a case in which hard labour is stayed pending an appeal.

Held further, that, in regard to the period of delay between the date of dismissal of the application in revision and the date of resumption of hard labour, namely between 14th September and 30th October, the petitioner should be given the benefit of the entirety of this period.

APPLICATION to revise an order of the Magistrate's Court, Colombo.

S. Sinnatamby, for the petitioner.

S. B. Wadugodapitiya, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 15, 1968. WEERAMANTRY, J.—

The applicant in this case was convicted in the Magistrate's Court of Colombo of the offence of theft and was sentenced to a term of one year's rigorous imprisonment on June 2nd 1967. He did not appeal against

the order of the learned Magistrate but made an application in revision which was filed on July 13th 1967. On July 17th this court ordered notice of this revision application to issue on the respondent and at the same time made order that hard labour be stayed till the disposal of the application in revision. The prison authorities were duly informed of this order on July 19th.

The matter thereafter came up for argument on August 2nd 1967 and this Court delivered its order on September 14th dismissing the application. When order was made dismissing the application this Court made no order regarding resumption of hard labour as the fact that hard labour had been stayed was not brought to its notice.

It would appear that the fact that hard labour had been stayed passed unnoticed until October 20th 1967 when the petitioner himself drew the attention of the Registrar to the fact that he was still on remand. The prison authorities were then immediately informed of the dismissal of the application. The accused states in his petition that hard labour was resumed on December 5th 1967 but the prison authorities in a communication to the Registrar have stated that the date of resumption of hard labour was October 30th. For the purpose of this order I shall assume the correctness of the latter date.

In the result, then, the accused petitioner has been on remand with hard labour stayed from July 19th 1967 to October 30th 1967, a period of three months and eleven days. This period is broadly divisible into two portions—that between the stay order and the dismissal of the application and that between dismissal of the application and resumption of hard labour.

The accused petitioner prays that this court be pleased to direct that the entire period during which he was so kept on remand without hard labour be deducted from the term of one year's rigorous imprisonment imposed on him.

As this case appears to be one without precedent I have made a request for the assistance of Crown Counsel as amicus and I am thankful to learned Crown Counsel who appeared and assisted the court in response to this request.

There is no authority or provision of law which either Counsel has been able to discover in regard to a similar matter in so far as applications in revision are concerned. However, in regard to appeals, there is the provision contained in section 341 of the Criminal Procedure Code. This section deals with appeals preferred by persons sentenced to rigorous imprisonment and provides for their release on their entering into a recognizance with or without sureties in such sum as the court may direct, conditioned to abide by the judgment of the Supreme Court and to pay such costs as may be awarded. The section further provides that when a person sentenced to a term of rigorous imprisonment has preferred an

appeal but is unable to give the required recognizance or other security, he shall be detained in custody without hard labour until the judgment of the Supreme Court is made known to the Superintendent of Prisons. The Supreme Court is further given power to order that the time so spent by the appellant in custody or any part thereof shall be reckoned as part of the term of his sentence.

I have not been able to obtain any guidance from the English law on the principles governing the extent to which custody without hard labour is to be taken into account in reckoning the sentence, for the reason that by section 1 of the Criminal Justice Act 1948 imprisonment with hard labour has been done away with.

The duty to release an accused appellant on bail pending the hearing of his appeal is imposed on the court in imperative terms by section 341 and receives such strict recognition in our law that even habitual criminals are not denied the benefit of this provision [1]. In this respect the imperative terms of our Code contrast strongly with the corresponding Indian provision (section 426 of the Indian Code of Criminal Procedure No. 5 of 1898) under which release on bail pending appeal may only be granted for reasons to be recorded in writing by the Appellate Court.

It is presumably in view of this right to be released on bail that our Code makes express provision enabling this court in its discretion to grant relief to an appellant who remains in custody during the pendency of an appeal by reason only of his inability to furnish the recognizance or other security ordered by court.

In regard to the first portion of the period of custody without hard labour, that is to say the period between the stay order and the dismissal of the application in revision, the question I must consider is the applicability to revision applications of the aforementioned rules governing appeals.

I see little distinction in principle between an appeal in which hard labour is stayed and a revision application in which this court has made express order to the same effect. Moreover the revision application in this case has been filed in respect of an appealable order and I do not think it would be correct to deny relief to the applicant on the mere technicality that what came before this court was a revision application and not an appeal. If in the exercise of its jurisdiction this court may give by way of revision the same relief it may grant by way of appeal I see no justification for denying to an applicant in revision, whose application has been entertained by this court, an elementary right which is conferred on every appellant. The silence of the Criminal Procedure Code on this matter cannot take away from the inherent powers of this

[1] *R. v. Martin (1923) 25 N. L. R. 169 at 172-3 — partly overruled by Kurup v. Banda (1923) 25 N. L. R. 402 but not on this point.*

court to grant relief of the nature contemplated by section 341 (5) to an applicant in revision. The grant of such relief is of course a matter entirely in the discretion of the court and will always be dependent on the particular circumstances of each case. In the circumstances of this case I cannot lose sight of the fact that notice has issued upon the revision application and that a stay of hard labour has been expressly ordered by this court. It is also most unusual for revision applications to be filed by accused in jail and I understand this to be the only application so filed over a long period of time.

In the circumstances I am disposed to make order that the accused petitioner be granted the benefit of half the period between stay and dismissal of his application. This period is a period of approximately two months, and it would meet the ends of justice if one month out of this period is reckoned as part of the term of his sentence.

We come now to the ensuing period of delay between the date of dismissal of the application to wit September 14th 1967 and the date of resumption of hard labour to wit October 30th 1967. This delay of one and a half months ought not in any case to have occurred and has only resulted from the altogether unusual situation of an accused person in jail resorting to a revision application. There appears in consequence to have been an oversight in bringing the judgment of this court to the notice of the prison authorities.

It is true that the blame for this delay lies at any rate partly at the door of the applicant who ought to have brought to the notice of the prison authorities the fact that his application was dismissed. He was no doubt aware within a few days of the order of this court that this order had not been officially communicated to the prison authorities and he should then have communicated the order himself, instead of doing which, he has chosen to wait till October 20th 1967 before bringing this matter to the notice of this court. However, whatever the remissness of the applicant, I think it undesirable that any applicant to this court for relief should be under the impression that his period of confinement has in any way been lengthened by the non-communication of the order of this court to the prison authorities. As I have observed earlier the non-communication of the order is understandable in the altogether unusual circumstances of the application, but any appearance of resulting prejudice to the accused must be avoided.

I give the accused petitioner the benefit of the entirety of this period, namely a period of one and a half months.

In the result I direct that two and a half months of the period during which the accused petitioner was in custody without hard labour be reckoned as part of the term of his sentence.

Order varied.