1961 *Present :* **T. S. Fernando, J.**

W. S. KOLUGALA and another, Petitioners, *and* THE SUPERINTENDENT OF PRISONS, COLOMBO, and others, Respondents

*S.C. 339 of 1960 and 117 of 1960—Applications for a Writ of Habeas Corpus for the production of Loku Banda Kolugala and for a Writ of Certiorari on a Tribunal constituted under Section 70 of the Prisons Ordinance.*

*Suspension of sentence by Governor-General—Subsequent cancellation thereof—Arrest of sentenced person when at large—Requirement thereafter of order of remand by Magistrate—Illegal sentence of imprisonment by a Prisons Tribunal—Liability to be quashed by Certiorari—Prisons Ordinance (Cap. 44), s. 70—Criminal Procedure Code, ss. 36, 37, 328 (3).*

Where a person who is at large within the meaning of section 328 (3) of the Criminal Procedure Code is arrested by a police officer without a warrant, a subsequent detention of that person in prison without an order of remand by a Magistrate's Court is not lawful. In such a case, if the arrested person escapes from prison and is subsequently tried and sentenced by a tribunal constituted under section 70 of the Prisons Ordinance (Cap. 44) on a charge of escaping from lawful custody, the order of the tribunal is liable to be quashed by a writ of *certiorari*.

APPLICATIONS for a writ of *habeas corpus* and a writ of *certiorari*.

*Colvin R. de Silva*, with *Siva Rajaratnam*, *B. J. Fernando* and *H. E. P. Cooray*, for the petitioner in each Application.

*R. S. Wanasundere*, Crown Counsel, for the respondent in Application No. 339 and as *amicus curiae* in Application No. 117.

*Cur. adv. vult.*

January 5, 1961. T. S. FERNANDO, J.—

Of these two applications, the *habeas corpus* application was argued before me on December 7, 1960, and, at the conclusion of that argument, it became apparent to me that no effective order could be made thereon until I had heard argument on a connected application, viz., application No. 117 of 1960 which sought a mandate from this Court in the nature of a Writ of Certiorari quashing an order made by a Prison Tribunal which had found the petitioner L. B. Kolugala guilty of escaping from lawful custody and had sentenced him to serve a term of two years' rigorous imprisonment thereon. Accordingly, argument on the *certiorari* application was heard by me on December 16, 1960.

The *habeas corpus* application has been presented by the wife of L. B. Kolugala referred to above and canvasses the legality of her husband's detention in prison. It is necessary to set out the circumstances in which he comes to be so detained.

Kolugala was found guilty in D. C. Kandy (Criminal) Case No. 614 of having committed certain offences and was sentenced by that Court to undergo a term of two years' rigorous imprisonment. An appeal to the Supreme Court having proved unsuccessful he was committed by the District Court of Kandy on 5th August 1958 to serve the period of two years' imprisonment. A copy of the relevant warrant of commitment has been produced in the present proceedings and is marked R1. He sought to apply to Her Majesty in Council for special leave to appeal against his conviction and sentence, and for that purpose obtained from His Excellency the Governor-General on 8th August 1958 a suspension of the execution of his sentence on certain conditions which are set out in the order of suspension of execution of sentence, a copy of which is marked R4 This order was effective for five weeks from 8th August 1958, and successive orders of suspension of execution of sentence were made by the Governor-General, copies of which are marked R5, R6, R7 and R8. It will be sufficient if I refer only to the last of these orders, viz., R8, which was made on 8th December 1958 and which was operative "up to and including 17th December 1958 or until the date on which it is known whether special leave to appeal to Her Majesty in Council has been granted or refused, whichever date is earlier". Among the conditions subject to which each order for suspension of execution of sentence had been made was one which required Kolugala to enter into a bond in a sum of Rs. 12,000 as security for the due observance by him of the other conditions subject to which the order of suspension of execution of sentence had been made. It is admitted that Kolugala failed to perform the condition imposed by order R8 which required him to enter into a security bond. It is not disputed that the Privy Council had by 16th December 1958 refused to grant Kolugala special leave to appeal from his conviction and sentence.

The Governor-General by an order dated 20th December 1958 (copy P2) made a formal cancellation of the order of suspension of execution of sentence (copy R8) which had been made by him on 8th December 1958.

By letter (copy P1) of 22nd December 1958, the Permanent Secretary to the Minister of Justice informed the Inspector-General of Police of the formal cancellation by the Governor-General of the last order of suspension of execution of sentence and directed his attention to the steps that could be taken in terms of Section 328 (3) of the Criminal Procedure Code for the enforcement of the judgment of the court.

One of the conditions subject to which the order R8 had been made was "that if by reason of the cancellation of this order or by reason of any order made by Her Majesty in Council or otherwise, the said Loku Banda Kolugala becomes liable to undergo the sentences imposed on him in D.C. Kandy (Criminal) Case No. 614 or any other or further penalty, he should forthwith surrender to the proper authority to be dealt with in due course of law". It is not disputed that by 17th December 1958 Kolugala had become aware of the refusal by Her Majesty in Council to grant him special leave to appeal. In accordance with the terms of order R8, Kolugala should therefore have surrendered forthwith to the proper authority to be dealt with in due course of law. There was nothing to prevent him from surrendering to the proper officer of the prison when he learnt of his failure to obtain special leave to appeal. He failed, however, to surrender and, in my opinion, was at large within the meaning of Section 328 (3) of the Criminal Procedure Code. Being at large, he became liable to be arrested by any police officer without warrant. Section 328 (3) of the Criminal Procedure Code which I reproduce below sets out the procedure to be followed in cases of this nature :—

> "If the person in whose favour a sentence has been suspended or remitted fails to fulfil the conditions prescribed by the Governor-General the Governor-General may cancel such suspension or remission ; whereupon such person may if at large be arrested by any police officer without warrant and remanded by a Magistrate's Court to undergo the unexpired portion of the sentence."

After P1 was received by the Inspector-General of Police, a police officer arrested Kolugala on 16th April 1959. The material placed before me does not disclose why there was a delay of nearly four months before the arrest was made, but the question of this delay is not relevant to the issue that arises on the application before me. The arrest having been made, Kolugala was taken by the Police to the prison from which he had been released on 8th August 1958, and it would appear that he thereafter began to serve the unexpired portion of the sentence imposed on him in D. C. Kandy (Criminal) Case No. 614. While so serving the unexpired portion of his sentence it is admitted that on 17th July 1959 he escaped from the custody of the prison authorities and found his way out of this country into India. He appears to have been apprehended in India and brought back to Ceylon where he was given over again to the custody of the prison authorities on 18th November 1959. After his readmission to the prison he was tried by a tribunal constituted under Section 70 of the Prisons Ordinance (Cap. 44) on a charge

of escaping on 17th July 1959 from *lawful* custody, and was sentenced by that tribunal to undergo a term of two years' rigorous imprisonment.

It would also appear that on 23rd December 1959 another warrant committing Kolugala to prison was issued by another District Court—this time the District Court of Matale—which had convicted him in D. C. Matale (Criminal) Case No. 641 and sentenced him to undergo 3 months' rigorous imprisonment. In ordinary circumstances, the sentence imposed in the latter case (D. C. Matale 641) would commence to run only from the date on which the service of the sentence imposed in the earlier case (D. C. Kandy 614) is completed.

The decision of the *habeas corpus* application would appear to me to turn on the meaning of Section 328 (3) of the Criminal Procedure Code referred to by me earlier in this judgment. The arrest of Kolugala by a police officer without warrant on 16th April 1959 was entirely in order. Indeed, there has been no argument to the contrary. The substance of the argument in support of the issue of the writ is that the admission of Kolugala into the prison following upon his lawful arrest was, however, without lawful authority. It is contended that to make detention of a person in the prison lawful after an arrest of that person following upon the cancellation of an order which had suspended the execution of a sentence imposed on him, it was necessary for the Police to have obtained an order from a judicial authority who in this case was the magistrate specified in Section 328 (3) of the Code. Without an order for remand issuing from the judicial authority, so the argument proceeded, the incarceration of Kolugala was unlawful, notwithstanding the circumstance that the original warrant of commitment remained unexecuted and was still valid.

Crown Counsel, showing cause against the issue of the writ, contended in the first place that Section 328 (3) had no application here as Kolugala had not failed to fulfil the conditions prescribed by the Governor-General in order R8. This contention, it appears to me, has no merit, as one of the conditions stipulated in the order was that Kolugala should enter into a bond and it is not denied that he failed to enter into that bond. Apart from that, Kolugala undertook by R8 to surrender to the proper authority on or before 17th December 1958, which undertaking too was observed by him only in the breach. Secondly, Crown Counsel contended that, assuming Section 328 (3) was applicable in the circumstances of this case, that part of the Section which refers to a remanding by a Magistrate's Court is not a mandatory provision of the law. He appeared to me to suggest that as the Section authorised an arrest without warrant the consequential provision relating to a remand of the arrested person was much in the nature of the procedure enacted by law in respect of the manner in which persons arrested by peace officers without warrant are to be dealt with. This procedure is to be discovered in Sections 36 and 37 of the Criminal Procedure Code. While the procedure contemplated in Section 328 (3) may be analogous to the procedure outlined in Sections 36 and 37, I fail to see how this circumstance can advance the contention of

Crown Counsel. Where a person has been arrested by a peace officer without warrant the law requires the arrested person to be produced before a Magistrate within twenty-four hours. The Magistrate will thereupon consider whether such person should be released from custody or whether he should be remanded to the custody of the Fiscal. The detention of a person so arrested by a peace officer beyond the specified period of twenty-four hours would *prima facie* be an unlawful detention. Similarly, it seems to me, where a person who was at large within the meaning of Section 328 (3) has been arrested by a police officer without warrant, the detention of that person by that police officer without obtaining an order of remand by a Magistrate's Court forthwith would *prima facie* be an unlawful detention. The circumstance that the person so arrested has been handed over by the police officer in question to the custody of the prison where he must ultimately find himself does not appear to me to have the effect of transforming the character of the detention to a lawful detention. In other words, in the absence of an order of remand by a Magistrate's Court the detention of the arrested person in prison would be unauthorised and would have no greater validity than a continued detention in the custody of the Police officer himself. It is not unreasonable to assume that the legislature had good cause to provide that detention of a citizen in the custody of the police beyond a specified period, e.g., 24 hours in the case of persons falling within Section 37 of the Criminal Procedure Code, should come under the surveillance of a judicial authority. There is no room, in my opinion, in the present case for any speculation in regard to the necessity of an order of a Magistrate's Court. Section 328 (3) of the Code provides expressly for the procedure to be followed, and I am not prepared to say that the requirement of a remand as specified therein is purely formal. I am well aware of the fact that orders of remand where arrested persons are produced before a Magistrate in terms of Section 37 of the Code are judicially considered, and sometimes refused. When the person arrested is produced before a Magistrate's Court on an application for an order remanding him to undergo the unexpired portion of the sentence, it seems to me that there is a justiciable issue before the Court. It would be open to the person arrested to show cause against a remand. The circumstance that in the case before me no good cause could have been shown by Kolugala against a remand is, in my opinion, irrelevant to the issue whether he should have been taken before a Magistrate's Court after his arrest without warrant on 16th April 1959 and an order remanding him to prison obtained from such a Court. In taking him to prison without an order from a Magistrate's Court and detaining him thereafter in the prison where he has since been undergoing rigorous imprisonment, the officers concerned appear to have acted without legal authority. The detention in prison of Kolugala on and after 16th April 1959 is therefore, in my opinion, not lawful, although the *bona fides* of the officers concerned is not questioned.

A further argument against the granting of the application, even if the detention is held to be without authority, was advanced by Crown Counsel who relied upon certain dicta contained in the judgment of Viscount Reading C.J. (with whom were associated six other judges of the King's Bench) in the case of *R. v. Governor of Lewes Prison, ex parte Doyle* [1], and particularly on the following observations :—

> " But, even though we had come to the conclusion that the warrant of commitment was bad on the face of it, as this is a case of commitment after conviction we are again not only entitled but bound to look at the conviction in order to see whether there is more than a mere technical defect in the commitment. "

A study of the case satisfies me that the decision has no application to a case like that before me. Here the original warrant of commitment is still valid and was at no time defective. What is defective is the manner in which Kolugala was brought back to prison and I have already expressed the opinion that that defect is not a purely formal one.

Crown Counsel brought to my notice that Kolugala has had the benefit of an amnesty offered to certain prisoners this year and has also earned certain remissions of his term of imprisonment available to prisoners who have been of good conduct while in prison. I was informed that, if the term of imprisonment imposed on him by the prison tribunal is excluded, Kolugala would ordinarily be due to be discharged from prison early in January 1961. It becomes necessary, therefore, that I should deal with the *certiorari* application presented to this Court by Kolugala himself.

The charge tried by the tribunal alleged that on 17th July 1959 Kolugala escaped from the *lawful* custody of a prison guard while undergoing treatment in one of the wards of the General Hospital at Kandy. It may be noted that there is no right of appeal from an order of a prison tribunal; it is, however, not doubted that such a tribunal is amenable to the jurisdiction of this court exerciseable by way of the issue of a mandate in the nature of a writ of *certiorari*. The record of the prisons tribunal relating to the trial of the charge referred to above has been examined by me and therein appear the reasons for the order convicting Kolugala of the offence of escaping from lawful custody. The President of the tribunal who is the first respondent to application No. 117 of 1960 states in the course of his statement of reasons which I hold to be part of the order made by the tribunal that the provision in Section 328 (3) of the Criminal Procedure Code relating to the remanding by a Magistrate's Court of a person who has been at large and who has been arrested by a police officer without warrant was inapplicable in the case of Kolugala as the order R8 made by the Governor-General on 8th December 1958 did not become operative. The learned President states that the previous order of suspension of

[1] *(1917) 2 K. B. 254 at 269.*

execution of sentence R7 which had become operative expired on 3rd December 1958, and although another order R8 had been made on 8th December 1958 this latter order could have come into effect only on Kolugala entering into a fresh security bond as contemplated therein. As Kolugala failed to enter into a fresh bond, the tribunal's order states, the Governor-General's order R8 failed to take effect and became inoperative, and thereby the provisions of Section 328 (3) did not require to be complied with in his case. This reasoning leaves out of account, for instance, the situation that arose in the case of Kolugala during the period 3rd December to 8th December, i.e. the period between the expiry of order R7 and the signing of order R8. The Governor-General by Order R8, it may be noted, made " order that the execution of the sentence of imprisonment imposed on Loku Banda Kolugala, accused in D. C. Kandy (Criminal) Case No. 614 be *further* suspended up to and including 17th December 1959 ". It seems clear that at any rate his order covered the suspension of the execution of the sentence on Kolugala from the 3rd December to the 8th December and to that extent was not inoperative. I have already stated in dealing with the habeas corpus application that the entering by Kolugala into a fresh bond was one of the conditions prescribed by the Governor-General for the further suspension of the execution of Kolugala's sentence. The order R8 in terms recites that it is such a condition, and I am satisfied that the tribunal erred in law in reaching the conclusion that this order did not at any stage become operative and for that reason Kolugala's case did not attract to itself the provisions of Section 328 (3) of the Criminal Procedure Code. There is, therefore, error of law appearing here on the face of the record, in the speaking order, and that error goes to the root of the matter that is in issue on this application. If he was not lawfully in custody, Kolugala obviously cannot be said to have escaped from lawful custody when he slipped past the prison guard and made his getaway from the hospital ward. I would for the reason I have stated above quash the order of the prison tribunal made on 18th December 1959 sentencing Kolugala to 2 years' rigorous imprisonment.

In the result, Application No. 117 of 1960 is allowed. Application No. 339 of 1960 is also allowed in the sense that the imprisonment of Kolugala that was resumed on 16th April 1959 is declared to have been without lawful authority. He is of course liable to be rearrested and legally remanded to serve any unexpired portion of a sentence or sentences of imprisonment imposed on him, but in view of the statement made to me during the course of the argument by learned Crown Counsel that Kolugala is actually due to be discharged from prison early in January 1961, the proper authorities will no doubt consider the desirability of rearrest and the consequential action involved.

Having regard to all the circumstances of this case, I make no order in regard to the costs of either application.

*Applications allowed.*