1958 *Present :* Sinnetamby, J.

N. THAMBOO, Petitioner, *and* THE SUPERINTENDENT OF PRISONS *et al.*, Respondents.

S. C. 122—Application for a Writ of Habeas Corpus.

Habeas corpus—*Scope of writ.*

A writ of *habeas corpus* is not available against an order of committal which is based on a judgment of the Supreme Court or against a committal after trial by an inferior Court acting within its jurisdiction.

APPLICATION for a writ of *habeas corpus.*

C. S. Barr Kumarakulasinghe, with *G. L. L. de Silva, T. W. Rajaratnam* and *R. R. Nalliah,* for the petitioner.

Douglas Jansze, Q.C., Acting Attorney-General, with *R. S. Wanasundera,* Crown Counsel, and *H. L. de Silva,* Crown Counsel, as *Amicus Curiae.*

Cur. adv. vult.

February 21, 1958. SINNETAMBY, J.—

This application for a writ of habeas corpus is a sequel to the decision of the Supreme Court in the case of *Mohideen v. Inspector of Police, Pettah*[1]. The decision in that case rendered it imperative for evidence to be recorded by a Magistrate before a person who has appeared or is brought before him otherwise than on a summons or warrant is charged.

In the present case the accused had been charged without any evidence being recorded as required by that judgment ; he had been convicted at the conclusion of the trial and sentenced to imprisonment ; he appealed and in appeal the conviction was affirmed but the sentence was reduced. He is now serving the reduced sentence and the present application is made on the ground that the conviction and sentence by the Magistrate is illegal and void and that therefore he is being held by the prison authorities in illegal custody. Even if the applicant succeeds in this application it may well turn out to be a pyrrhic victory as he is liable on the same charge to be tried over again, but the question that arises is an important one with far-reaching consequences. I therefore deemed it prudent to require the learned Attorney-General to appear as *amicus curiae* and assist this Court in the determination of this question. He did so and I am much indebted to him for his help and assistance.

[1] *(1957) 59 N. L. R. 217.*

The first question that calls for decision is whether a writ of habeas corpus is available in cases where a person is committed to the prison authorities after trial by the duly constituted Courts of law. The first respondent in this case, viz. the Superintendent of Prisons, Jaffna, has produced the order of committal on which is endorsed in red ink the order of the Supreme Court in appeal reducing the sentence. Is the production of this order of committal sufficient to discharge the notice that issued on the first respondent ?

The English rule is that a writ will not be granted to persons committed for felony or treason plainly expressed in the warrant of committal or to persons convicted or in execution under legal process including persons in execution of a legal sentence after conviction on indictment in the usual course. These provisions are now incorporated in the Habeas Corpus Act which merely re-stated the common law on the subject. The law applicable in Ceylon is the same as in England. It will thus appear that ordinarily a writ will not be granted if there is a warrant of committal duly signed by a judge of the Court. The only cases where writs have issued or would issue are cases in which the sentence itself is clearly illegal—for instance, where an offence is punishable only by a fine but the Court has imposed a term of imprisonment or where the term of imprisonment imposed exceeds the maximum provided for the offence. But where otherwise the matter is within the jurisdiction of the Court the writ would not lie in England. In this respect the law in England is much narrower than that in force in the United States of America where all questions of jurisdiction, as for example territorial jurisdiction, can be brought up for consideration by writ of habeas corpus. Many, therefore, of the decisions of the American Courts would not be applicable to Ceylon and learned Counsel for the petitioner certainly did rely on several American cases.

This question was considered by Chaudhuri, J. in the case of *Bonom Ally Gupta*[1]. Chaudhuri, J. is a well known authority on the subject and is the author of the textbook bearing his name. He expressed his view in that case as follows :—

> "I think it is well established that a writ of that nature is not granted to persons convicted, or in execution under legal process including persons in execution of a legal sentence after conviction on indictment in the usual course. It is not granted where the effect of it would be to review the judgment of one of the superior Courts, which might have been reviewed on a writ of error, or where it would falsify the record of a Court which shows jurisdiction on the face of it."

In the case of *Janarthan Reddy v. The State of Hyderabad* it was stated that—

> "as regards the writ of habeas corpus, if it should appear on the face of the return that a person is in detention in execution of a sentence on indictment or on a criminal charge, that would be a sufficient answer to the writ."

[1] *(1917) I. L. R. (Calcutta) 733.*

This case is referred to by Markose in his book on Judicial Control of Administrative Action in India (p. 166). The same author at page 167 goes on to say :—

> " In England jurisdiction over the subject matter and the sentence awarded are enquired into..... ."

Chaudhuri, J. in his judgment also referred to the case of *King v. Suddis* where Grose, J. said :—

> " it is enough that we find such a sentence pronounced by a Court of competent jurisdiction to enquire into the offence, and with power to inflict such a punishment. As to the rest we must therefore presume *omnia rite acta*."

Le Blanc, J. is quoted as saying :—

> " It is sufficient for the officer having him in his custody to return to the writ of habeas corpus that a Court having a competent jurisdiction had inflicted such a sentence as they had authority to do, and that he holds him in custody under that sentence."

Learned Counsel for the petitioner gave to the word " jurisdiction " a wider connotation than what the English judges intended. He sought to give it the wider meaning which the American judges gave it. In the present case for instance he argued that the jurisdiction of the Magistrate will arise only if he had followed the procedure set out in the Code in accordance with the judgment of the Divisional Bench. I am, however, unable to agree with learned Counsel's contention. The English cases make it clear that the word " jurisdiction " relates to the question of whether the Court is empowered by law to try cases of the type in which the offender was tried and convicted. In *re Ex Parte Ferguson*[1] Reading, J. put the matter thus :—

> " If the jurisdiction exercised by the magistrate is a jurisdiction which has been conferred upon him by the statute, then, notwithstanding that he may have come to a wrong decision on the facts or upon the law, it is clear that his decision cannot be questioned by this procedure (viz. Habeas Corpus) In the present case there is no doubt as to the jurisdiction of the magistrate. It is not suggested that he was not the proper tribunal to deal with the case."

It is, I conceive, correct to say that the Magistrate who tried the prisoner, having regard to the judgment of the Divsional Bench, came to a wrong conclusion on the law when he decided to charge the accused in this case without first recording evidence. That procedure was at the time of the trial in the case accepted to be the correct procedure. It was open to the prisoner when he appealed to this Court to have made it a ground on which to challenge his conviction. He chose not to do so. Can he now

[1] *(1917) 1 K. B. 176.*

by suing out a writ of Habeas Corpus seek to obtain a decision on that point ? This is precisely what the English cases condemn as being tantamount to attempt to obtain a review of the case having failed in the first appeal or not having appealed at all.

Supposing the prisoner did take this point in his appeal and the Court, as it probably would have done having regard to the views then held, rejected it. Would it be open to him now to re-agitate the matter by way of Habeas Corpus ? The answer to that question would be a definite and a categorical " No ". Then the mere fact that he had not taken the point which he could well have taken, in my opinion, should make no difference. In my view therefore in the circumstances of this case the writ of Habeas Corpus is not available to the accused.

The other question that requires consideration is whether it is open to the Court to allow a writ of habeas corpus as against an order of committal which is based on the judgment of this Court. The English law is quite clear. No writ will be allowed questioning the decision of a superior Court. *In re Dunn*[1]. In the present case there was an appeal to this Court from the finding of the magistrate. The case was reviewed by this Court which while affirming the conviction reduced the sentence. The final judgment upon which the petitioner is incarcerated is in my view the judgment of this Court and not a judgment of an inferior Court and a writ will not therefore lie.

The rule should accordingly be discharged and the application dismissed. I so order.

Application dismissed.

[1] *(1847) 17 L. R. C. P. 97*

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