1952 *Present :* **Gratiaen J. and Gunasekara J.**

THE ATTORNEY-GENERAL, Applicant, *and*
P. SRISKANDARAJAH, *et al.*, Respondents

S. C. 64—Application for Conditional Leave to Appeal to the Privy Council in S. C. Application 594 of 1951

Privy Council—Mandamus—*Refusal by Supreme Court—Question of criminal procedure involved—Right of appeal to Privy Council—Appeals (Privy Council) Ordinance, Schedule, Rule 1—Criminal Procedure Code, ss. 152 (3), 390 (2).*

In an application by the Attorney-General for conditional leave to appeal to Her Majesty in Council against a refusal by the Supreme Court to issue a mandate in the nature of a writ of *mandamus* directing the first respondent, a Magistrate, to carry into effect instructions of the Attorney-General to take non-summary proceedings in respect of an offence which, acting under section 152 (3) of the Criminal Procedure Code, the Magistrate had already decided to try summarily—

***Held*, that the question involved was not one of great general or public importance within the meaning of Rule 1 (*b*) of the Schedule to the Appeals (Privy Council) Ordinance.**

APPLICATION for conditional leave to appeal to the Privy Council.

Walter Jayawardene, Crown Counsel, for the applicant.

No appearance for the respondents.

Cur. adv. vult.

February 26, 1952. GUNASEKARA J.—

This is an application by the Attorney-General for conditional leave to appeal to Her Majesty in Council against a refusal by this Court to issue a mandate in the nature of a writ of *mandamus* directing the first respondent, a Magistrate, to carry into effect certain instructions which the Attorney-General had purported to give him under section 390 (2) of the Criminal Procedure Code (Cap. 16). It is contended for the Attorney-General that the application for a *mandamus* was a civil suit or action within the meaning of section 3 of the Appeals (Privy Council) Ordinance (Cap. 85) and that the question involved in the proposed appeal is one of great general and public importance and is one which, by reason of such importance, ought to be submitted to Her Majesty in Council for decision.

The instructions related to a case instituted in the Magistrate's Court of Colombo on the 10th October, 1951, in which the second and third respondents are accused of having on or about the 22nd July committed criminal defamation (punishable under section 480 of the Penal Code) by printing and publishing certain statements in a newspaper. The offence is one that is not triable summarily by a Magistrate's Court but is triable by a District Court or the Supreme Court, and is punishable with simple imprisonment for a term which may extend to two years or with fine or with both. On the 24th October the first respondent, who is a Magistrate of Colombo and is also a District Judge having jurisdiction to try the offence, decided to try it summarily in the exercise of his discretion under section 152 (3) of the Criminal Procedure Code. He took this decision after he had heard the evidence of the person alleged to have been defamed and after counsel for the defence had stated that " the publication and the contents of the article are not disputed and he would like the case being heard summarily ". The second and third respondents were then charged summarily with the offences alleged against them and they pleaded not guilty, and the case was set down for trial on the 12th November, 1951. On the 7th November the Attorney-General, purporting to act under section 390 (2) of the Criminal Procedure Code, instructed the first respondent to discontinue the summary proceedings and to take proceedings under Chapter XVI of that Code in respect of the offences alleged against the second and third respondents. On the 12th November counsel for the defence contended before the first respondent that the Attorney-General had no power to give him these instructions and objected to his carrying them into effect. On the 19th November the first respondent made order upholding the objection and setting the case down for trial. Thereupon, on the 21st November, the Attorney-General made his application for a *mandamus*. That application was eventually heard by a Bench of three Judges and was refused on the 11th February, 1952.

Though the application for a *mandamus* may have been a civil suit or action, the question involved in the proposed appeal is purely a question of criminal procedure, and the rights that would be affected by a decision of the appeal would be the rights of parties to a criminal proceeding. It seems to be appropriate, therefore, that in exercising the discretion vested in this Court by Rule 1 (*b*) of the Rules in the Schedule to the Appeals (Privy Council) Ordinance we should be guided by the principles upon which the Privy Council acts in granting or refusing special leave to appeal in criminal cases.

In *Reg. v. Bertrand* [1] the Judicial Committee's judgment, having referred to " the inherent prerogative right and, on all proper occasions, the duty, of the Queen in Council to exercise an appellate jurisdiction, with a view not only to ensure, so far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally ", pointed out however that " interference by Her Majesty in Council in criminal cases is likely in so many instances to lead to mischief and inconvenience, that in them the Crown will be very

[1] *(1867) 1 A. C. (P. C.) 520.*

slow to entertain an appeal by its officers on behalf of itself or by individuals". As regards the circumstances in which such an appeal would be entertained the judgment said :

> " It is not necessary, and perhaps it would not be wise, to attempt to point out all the grounds which may be available for the purpose ; but it may safely be said, that when the suggestions, if true, raise questions of great and general importance, and likely to occur often, and also where, if true, they show the due and orderly administration of the law interrupted, or diverted into a new course, which may create a precedent for the future, and also where there is no other means of preventing these consequences, then it will be proper for this Committee to entertain an appeal, if referred to it for its decision. "

What the Attorney-General maintains in the present case is that he has the power to vary an order made by a Magistrate in the exercise of the discretion vested in the latter by section 152 (3) of the Criminal Procedure Code. If he has that power it does not appear that he has ever exercised it in the past, and Counsel for the Crown have been content to invoke instead the jurisdiction of this Court to review such orders. It cannot be said, therefore, that the question sought to be submitted to the Privy Council is one that is likely to occur often, or that if the Attorney-General's contention is sound the refusal of his application for a *mandamus* would have the effect of interrupting the due and orderly administration of the law or diverting it into a new course. On the other hand, the proposed appeal must delay by many months the disposal of the criminal case. I am not satisfied that there is sufficient ground for a view that the question involved is " one which, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council for decision. "

I would refuse the application.

GRATIAEN J.—I agree.

[The following order was made subsequently in connection with the same Application :—]

Present : **Gratiaen J. and Gunasekara J.**

T. S. Fernando, Crown Counsel, for the petitioner.

No appearance for the respondents.

April 8, 1952. GUNASEKARA J.—

In the judgement delivered by me on the 26th February I said :

> " What the Attorney-General maintains in the present case is that he has the power to vary an order made by a Magistrate in the exercise of the discretion vested in the latter by section 152 (3) o

the Criminal Procedure Code. If he has that power it does not appear that he has ever exercised it in the past, and Counsel for the Crown have been content to invoke instead the jurisdiction of this Court to review such orders."

Two orders made by the Attorney-General, one in October 1933 in Police Court Kalutara Case No. 9296, and the other in April 1947 in Magistrate's Court Horana Case No. 2283, are now cited to us as instances of the exercise of the power that is in question, and it is submitted on behalf of the Attorney-General that my statement that " If he has that power it does not appear that he has ever exercised it in the past" has been made *per incuriam*. In each of these cases the police instituted proceedings before a Magistrate's Court on a charge of attempted murder, an offence triable only by the Supreme Court and not summarily by a Magistrate's Court, but the Magistrate framed against the accused merely a charge of voluntarily causing hurt, which is an offence triable summarily by a Magistrate, and the Attorney-General thereupon instructed the Magistrate to discontinue the summary proceedings and take non-summary proceedings on the charge of attempted murder. In neither case was there an exercise or purported exercise of the discretion vested by section 152 (3) in a Magistrate who is also a District Judge to try summarily an offence triable by the District Court and not summarily by a Magistrate's Court, and in neither case did the Attorney-General's order purport to vary an order made by the Magistrate in the exercise of that discretion.

My statement to the effect that if the Attorney-General has the power to make such an order " it does not appear that he has ever exercised it in the past " was made advisedly and after Mr. Jayawardene who appeared for the Crown had said in answer to a question from me that he was not in a position to say that there had been any previous instance of the exercise of such a power. Apparently, even subsequent research in the archives of the Attorney-General's Department has failed to bring to light a single previous instance of an order made by the Attorney-General purporting to " vary an order made by a Magistrate in the exercise of the discretion vested in the latter by section 152 (3) of the Criminal Procedure Code ".

In the circumstances, I see no reason to alter the statement already made in my judgement.

GRATIAEN J.—I agree.

Application refused.