1947 *Present : Dias J.*

KANDASAMY, Petitioner, *and* BANDARANAYAKE, Respondent.

Application in Revision 339—M. C. Point Pedro.

Fugitive Offenders Act, ss. 13, 14—Application for surrender—Lawful authority to issue warrant—Endorsement of foreign warrant—Indian law.

An accused was convicted by the Court of Sessions in India. He preferred an appeal against his conviction to the High Court which affirmed the conviction and sent the case back to the Court of Sessions under section 425 of the Indian Criminal Procedure Code so that the Court of Sessions should give effect to the order of the High Court. The accused, however, absconded to Ceylon and was unlawfully at large in Ceylon before the expiry of his sentence.

Held, that a warrant for the surrender of the convict under Part II of the Fugitive Offenders Act, 1881, should have been signed by a Judge of the Court of Sessions and not by a Sub-Divisional Magistrate or Additional District Magistrate. There being no proof that the Indian law authorised a Judge of Sessions to delegate his powers under sections 92 and 425 of the Indian Criminal Procedure Code to the Sub-Divisional Magistrate or Additional District Magistrate, the warrant for the arrest of the convict was not issued "by a person having lawful authority to issue the same" within the meaning of section 14 of the Fugitive Offenders Act.

Held, further, that under section 13 of the Fugitive Offenders Act, before a Magistrate endorses the foreign warrant for execution in Ceylon he should be satisfied that it was issued by a person having lawful authority to issue the same.

Indian Law is "foreign law" and cannot be judicially noticed by a Ceylon Court.

APPLICATION in revision against an order of the Magistrate of Point Pedro.

H. V. Perera, K.C. (with him *H. W. Thambiah, H. Wanigatunga* and *S. Mahadevan*), for the petitioner.

H. Deheragoda, C.C., for the Attorney-General.

Cur. adv. vult.

August 26, 1947. DIAS J.—

The petitioner was tried in the Court of Sessions, East Tanjore Division, at Negapatam (a place within what was known as "British India") for the offence of criminal intimidation under section 506 of the Indian Penal Code. After trial he was convicted and sentenced to undergo two years rigorous imprisonment and to pay a fine of Rs. 1,000, and in default to undergo 6 months rigorous imprisonment (see exhibit P 3). The petitioner then appealed to the High Court of Madras which ordered the Sessions Judge to admit the petitioner to bail pending the determination of the appeal.

The High Court affirmed the conviction but set aside the fine, but the substantive sentence of two years rigorous imprisonment was confirmed (see P 4).

The petitioner thereafter applied to the Privy Council for special leave to appeal. This application was refused (see P 5 of October 25. 1945).

It is alleged that the petitioner thereafter, without surrendering to the Indian Court and serving his sentence, is unlawfully at large in Ceylon before the expiry of his sentence.

An earlier abortive attempt by the Indian authorities to secure the surrender of this petitioner is reported in *47 N. L. R. 470.* This Court then held that the proceedings culminating in the order for the surrender of the alleged fugitive were defective, and directed the petitioner to be forthwith discharged and freed from all restraint so far as those proceedings were concerned.

The Indian authorities thereupon started *de novo.* The warrant issued by the Indian Court is the exhibit P 1. That warrant bears the signatures of the Sub-Divisional Magistrate of Negapatam and of the Additional District Magistrate, Tanjore District. Both these signatures have been authenticated by the respective seals of the two Magistrates' Courts. There is also appended the affidavit of K. Marimuttu Pillai, the escort, to the effect that the Sub-Divisional Magistrate of Negapatam signed and sealed the warrant in his presence.

Marimuthu Pillai, who is a head constable of the Tanjore Police Force, brought this warrant and the connected papers to the Magistrate at Point Pedro who thereupon under Part II of the Fugitive Offenders Act 1881[1] endorsed the warrant for execution to Sub-Inspector Rosairo of the Ceylon Police and K. Marimuthu Pillai of the Tanjore Police and every Police Officer in Ceylon, for the arrest of the person named in the warrant.

Mr. H. V. Perera for the petitioner has taken objection to the summary way in which the Point Pedro Magistrate endorsed the Indian warrant. Section 13 of the Fugitive Offenders Act provides the procedure to be followed by the Ceylon Magistrate when such a warrant is produced before him for "backing" or endorsement. The relevant words of section 13 of the Act read as follows:—"A Magistrate in the last-mentioned possession (*i.e.* in Ceylon) if satisfied that the warrant was issued by a person having lawful authority to issue the same, may endorse such warrant in manner provided by this Act, and the warrant so endorsed shall be sufficient authority to apprehend within the jurisdiction of the endorsing Magistrate the person named in the warrant and bring him before the endorsing Magistrate or some other Magistrate in the same Possession". Mr. H. V. Perera contends that there is nothing on record to show that before the Point Pedro Magistrate endorsed the warrant P 1 he was "satisfied" that it was issued "by a person having lawful authority to issue the same". It is unnecessary to consider this aspect of the matter further in view of what follows.

This petitioner was apprehended under the warrant P 1 and produced before the Point Pedro Magistrate. The proceedings culminating in the endorsement of the warrant were necessarily *ex parte.* When the alleged fugitive is arrested, the procedure to be followed thereafter is *inter partes* and is laid down by section 14 of the Act. That procedure can be summarised as follows:—

It is the duty of the person demanding the surrender of the prisoner to make out his case for the surrender of the fugitive. The *onus* is

[1] *44 & 45 Vict. c. 69.*

on him to prove that this is a proper case in which the surrender of the person arrested should be granted. The points requiring proof are—

(*a*) that the warrant was duly "authenticated" as directed by the Act;

(*b*) that it was issued by a person having lawful authority to issue the same; and

(c) that the Magistrate should be satisfied by evidence that the prisoner then before the Court is the person named or otherwise described in the warrant.

Although under section 14 of the Act a Magistrate may, on proof of the foregoing, direct the surrender of the fugitive, yet under section 19 of the Act the Magistrate (or the Supreme Court in the exercise of its revisional powers or on an application for a writ of *habeas corpus*) can go into the merits of the case in respect of which the surrender is demanded.

Mr. Perera admits that the warrant has been authenticated, and he also admits that the petitioner is the identical person named in the warrant. But he contends that there is a total absence of proof that the warrant P 1 was issued by a person having lawful authority to issue it within the meaning of section 14.

Considering the precision with which this Act has been drafted, and the simple nature of the procedure provided, there should be no difficulty as to whether the warrant was issued by a person having lawful authority to issue it. As I have pointed out before, when the Point Pedro Magistrate endorsed the warrant, he ought to have satisfied himself on that point, and normally, therefore, when the fugitive appeared before the Court, proof of this fact should have been purely formal and should have created no difficulty. On the other hand, if the three ingredients of proof under section 14 of the Act or any one of them are or is not established, the whole proceeding will be vitiated and the prisoner would be entitled to claim his discharge. It is, therefore, necessary to consider whether the warrant P 1 was issued by a person having lawful authority to issue the same.

One point at once strikes the eye. This petitioner was convicted by the Court of Sessions at Negapatam. When the High Court of Madras in its appellate jurisdiction, and the Privy Council affirmed the conviction one would normally expect it would be for a Judge of the Court of Sessions at Negapatam to issue the extradition warrant. But P 1 has not been issued by a Judge of the Court of Sessions at Negapatam, but by the Sub-Divisional Magistrate and Additional District Magistrate of Negapatam, and, therefore, Mr. H. V. Perera argues that these two officers have no authority to issue a warrant for and on behalf of the Judge of the Court of Sessions at Negapatam. If we take a Ceylon analogy, once the Magistrate commits an accused to the District Court for trial he is *functus officio* and loses *seisin* of the record. Thereafter the District Judge will hold the trial and the accused, if convicted, will appeal to the Supreme Court. If the Supreme Court affirms the conviction, under section 350 of the Criminal Procedure Code the Supreme Court will certify its order under its seal to the District Court "which shall thereupon make such orders as are conformable to the order so certified".

If the accused does not appear before the District Court to serve his sentence and is unlawfully at large in India, the extradition warrant will be signed, not by the committing Magistrate, but by the District Judge. It is only he who is authorised either to issue a warrant for the arrest of the accused in Ceylon, or to issue a warrant under Part II of the Fugitive Offenders Act for his arrest in India.

Now Indian Law is "foreign law". Although the Ceylon Criminal Procedure Code is based on the Indian Criminal Procedure Code, the Judges in Ceylon are not bound to take judicial notice of Indian Law. It is a question of fact to be proved by the person demanding the surrender of the fugitive. What the escort has done in this case is to produce copies of the Indian Penal Code and the Indian Criminal Procedure Code and expect the Ceylon Courts to ascertain as best as they can what the Indian Procedure Code lays down in a case of this kind. Neither the researches of Mr. H. V. Perera nor of the Crown Counsel have shown me any section or provision in the Indian Criminal Procedure Code which authorises a Sub-Divisional or Additional District Magistrate to issue a warrant for or on behalf of the Sessions Judge.

I have studied the provisions of the Indian Criminal Procedure Code in order to ascertain whether any power exists in a Sessions Judge to delegate to a District Magistrate or to a Sub-divisional Magistrate any of his powers generally, or the special powers conferred on him under section 425 of the Indian Code, when the High Court in its appellate jurisdiction returns the record of a case to the Sessions Judge who tried the case to carry out the judgment of the High Court in appeal.

A "Sessions Judge" is defined by section 9 (1) of the Indian Code, a "District Magistrate" and an "Additional District Magistrate" by section 10. A "Sub-Divisional Magistrate" is defined by section 13 (2).

Section 17 of the Indian Code subordinates these officers to certain higher authority, but section 17 (5) provides that "Neither District Magistrates nor the Magistrates or Benches appointed or constituted under sections 12, 13, 14 and 15 shall be subordinate to the Sessions Judge *except to the extent and in the manner hereinafter expressly provided*". Chitaley and Rao in their commentary on the Indian Criminal Procedure Code (1946 edition) Vol. 1, page 289, say that "express provision to the contrary" has been made by sections 123, 193, 195, 408, 435 and 436 of the Indian Criminal Procedure Code. I have studied these provisions, but they contain nothing relevant to the matter now under consideration. Sections 435 and 436 confer on a Sessions Judge the right to call for and revise the proceedings of an inferior Court within his jurisdiction and to make the requisite orders. The exercise of no such powers was called for in the case now under consideration.

Section 75 of the Indian Code deals with the issue of warrants of arrest. It is provided that *every warrant of arrest* issued by a Court under this Code shall be in writing *and signed by the presiding officer.* Chitaley (Vol. I., pages 406-407) says:—"A warrant of arrest in order to be valid must fulfil the following requirements:—(*a*) It must be in writing, (*b*) It must be signed by the presiding officer. A warrant which is not signed by the authority issuing it is invalid, and any arrest made in

execution of such warrant is illegal . . . . The signature must be that of *the presiding officer of the Court,* and not that of any other Magistrate ".

Section 193 (1) of the Indian Code provides that " except as otherwise expressly provided . . . . no Court of Sessions shall take cognizance of any offence as a court of original jurisdiction, unless the accused has been committed to it by a Magistrate duly empowered in that behalf ". Section 206 indicates what Magistrates commit cases for trial before the Sessions Court. Section 218 indicates that once the case is committed, the committing Magistrate is *functus officio.* The procedure to be followed at a trial in the Court of Sessions is provided for by section 268 *et seq.* of the Indian Code.

Appeals from an Assistant Sessions Judge go to the Court of Session—Section 408 ; while appeals from a Sessions Judge or Additional Sessions Judge go to the High Court—section 410. When the appeal is disposed of by the High Court, the judgment or the order made is certified to " the Court by which the finding, sentence, or order appealed against was recorded and passed "—section 425 (1). The Court to which the High Court certifies its judgment or order " shall thereupon make such orders as are conformable to the judgment or order of the High Court "—section 425 (2). There is no power or jurisdiction given to the Court of trial to delegate the duty of the issue of a warrant for the arrest of an absconding accused (*e.g.,* under section 92 of the Indian Code) to the committing Magistrate or other subordinate officer.

Whether such power exists under the Indian Extradition Acts we do not, and cannot be expected to, know. It is for the person demanding the surrender of the fugitive to make these things plain [1].

Mr. Perera rightly complains that an item of inadmissible evidence has been allowed to be produced which must have prejudiced the mind of the Magistrate in these proceedings. This is the exhibit P 2. It is a letter written by the Additional District Magistrate, Tanjore, to the Inspector-General of Police, Ceylon, and reads as follows :—" This is to inform you that the Sub-divisional Magistrate at Negapatam has issued the annexed warrant of arrest on S. A. Kandasamy on orders of the Court of Sessions, East Tanjore, at Negapatam ". In the first place this document was produced by Mr. Dias Bandaranaike, Superintendent of Police, and not by the Inspector-General of Police. In the second place no authority is cited for the proposition that the Court of Sessions has power, either under the Indian Law or under the Fugitive Offenders Act, to authorise a Magistrate to issue a warrant like P 1 on behalf of the Sessions Judge. Can a District Judge authorise a Magistrate to issue a warrant on behalf of the District Judge ? I think the Magistrate erred in admitting P 2 as evidence. This is reflected in his judgment in the following passage:—" P 2 is a document received by the A. S. P. in the course of his official duties. There it is stated that the Court of Sessions has directed the Sub-divisional Magistrate to issue the warrant. In the absence of any provision to the contrary I have to hold that the

1 See de Mello's *Law of Extradition and Fugitive Offenders (1933 edition) p. 64.*

person issuing the warrant had the authority to do so". I think this is fallacious reasoning and has prejudiced the petitioner. Section 14 of the Act provides that he must be satisfied *inter alia* that the warrant was issued by a person having lawful authority to issue the same. Simply because the Additional District Magistrate, Tanjore, informed the Inspector-General of Police, Ceylon, that the Sub-divisional Magistrate at Negapatam issued the warrant P 1 on the orders of the Court of Sessions, East Tangore, it does not prove that this Magistrate was lawfully authorised to issue it.

Mr. Perera stresses two sections in the Indian Criminal Procedure Code. Section 92 of that Code corresponds to our section 65. Section 92 of the Indian Criminal Procedure Code provides that when " any person who is bound by any bond taken under this Code to appear before a Court does not so appear, *the officer presiding in such Court* may issue a warrant directing that such person be arrested and produced before him ". Suppose this petitioner instead of coming to Ceylon, did not surrender to his bail in India, under section 92 of the Indian Code it is the Judge of the Court of Sessions who would have to issue the warrant for his arrest. The extradition warrant is only an extension of this principle. If the Indian Law is that, in spite of section 92, some other officer could have lawfully issued the warrant referred to in that section, it is for the person demanding the surrender of the accused to satisfy the Ceylon Courts on that point. I have not been able to find any such provision.

The second section of the Indian Criminal Procedure Code relied on by Mr. Perera is section 425 which corresponds to our section 350. Section 425 provides that " whenever a case is decided on appeal by the High Court . . . . it shall certify its judgment or order *to the Court by which the finding, sentence or order appealed against was recorded or passed* . . . . The Court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or the order of the High Court ". *Delegatus non potest delegare*. Obviously, when the Court of Appeal certified to the Court of Sessions that the conviction of this petitioner was affirmed, it was for the Sessions Court to make such orders so as to carry out the directions of the High Court.

I, therefore, regretfully come to the conclusion that in terms of section 14 of the Fugitive Offenders Act a case has not been made out for the surrender of this fugitive. I say I come to this conclusion with regret because, once it is admitted that this petitioner is the convict referred to in the warrant and in the judgments of the Indian Courts, it is quite clear that for a great many years he has been circumventing the processes of the law by being unlawfully at large before the expiry of his sentence ; but that is no reason for slurring over a defect in procedure of this kind. I, therefore, set aside the order for the surrender of this accused and direct that he be freed from further restraint so far as these proceedings are concerned.

Order set aside.