1946 *Present :* **Dias J.**

KANDASAMY, Petitioner, *and* ROSAIRO (S. I., POLICE), Respondent.

In revision—M. C. Point Pedro, A 40.

Criminal procedure—Arrest of person under Fugitive Offenders Act, 1881, Part II—Subsequent discharge owing to want of proper materials—Propriety of ordering bail until arrival of proper materials—Criminal Procedure Code, ss. 32 (1) (i), 39—Provisional warrant.

Where a person who was alleged to have been convicted of an offence in British India was arrested in Ceylon on an Indian warrant issued under the provisions of Part II of the Fugitive Offenders Act, 1881, but was subsequently discharged owing to failure of proper identification and because the warrant was defective—

Held, that recourse could not be had to the provisions of sections 32 (1) (i) and 39 of the Criminal Procedure Code to prevent him from leaving Ceylon before the proper proof and papers arrived.

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

H. V. Perera, K.C. (with him *N. Nadarajah, K.C., H. W. Thambiah,* and *H. W. Jayewardene*), for the petitioner.

H. H. Basnayake, K.C., Acting Attorney-General (with him *H. Deheragoda, C.C.*) for the respondent.

Cur. adv. vult.

[1] *(1841) 8 M & W 234 ; 151 English Reports 1024 at 1027.*

October 21, 1946. DIAS J.—

One Kandasamipillai was convicted by the Sessions Judge of Nagapatam of the offence of criminal intimidation under section 506 of the Indian Penal Code and was sentenced to undergo two years' rigorous imprisonment and to pay a fine of Rs. 1,000.

The convict having appealed, he was admitted to bail pending the hearing. The Appellate Court deleted the sentence of fine, but affirmed the conviction and sentence of imprisonment. It is alleged that the convict absconded to Ceylon and failed to surrender and serve his sentence in India. It is asserted that that convict is this petitioner, and that he is now unlawfully at large in Ceylon before the expiration of his sentence.

The proceedings I am asked to revise are the record of the attempts made by the Indian authorities with the assistance of the local police to obtain the surrender of the alleged convict under the provisions of Part II. of the Fugitive Offenders Act, 1881 [1].

The warrant P1 which was issued by the Indian Court appears to be defective. In fact, the petitioner after his arrest has been discharged from his detention under P 1 and the proceedings under the Act abandoned while the Indian escort has returned to India without the alleged fugitive. The learned Attorney-General who appeared to assist the Court stated that the Indian authorities have been requested "to supply proper papers". We are particularly concerned with what happened after the proceedings under the Fugitive Offenders Act were abandoned.

Under Part II. of the Act certain British territories which lie in close proximity to each other are "grouped" for the purpose of that part of the Act. British India and Ceylon are members of one such group [2].

S. 34 of the Act provides that where a person *convicted* by a Court in any part of His Majesty's dominions of an offence is unlawfully at large before the expiration of his sentence, each part of the Act shall apply to such person in like manner as it applies to a person *accused* of the like offence committed in the part of His Majesty's dominions in which such person was convicted. If a convict in British India escapes to Ceylon before the expiration of his sentence and is unlawfully at large here, the Indian authorities can therefore demand his surrender under the simple procedure provided by Part II. of the Act.

The escort arrived in Ceylon, the warrant P 1 was endorsed by the local Magistrate, and the petitioner was arrested and produced before the Court. It was at this stage that the trouble began. At that point of time the officer of the escort had left Ceylon. He was therefore not available to identify the petitioner. It also seems as if the warrant P 1 under which the petitioner was arrested is itself defective.

When the case was taken up before the Magistrate on September 9, 1946, the local police moved for a summons on Abdul Rahiman, the Indian escort, to depose to the authenticity of the warrant P 1 and the identity of the petitioner. It was stated that the Ceylon police had cabled to the Indian authorities to produce further evidence in support of the application for surrender.

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

[2] See Proclamation dated March 21, 1918, published in *Government Gazette* No. 6,932 of March 28, 1918.

The Magistrate then adjourned the case until September 12. On that day the police again moved for a date to enable them to produce documents proving the identity of the petitioner. It then became clear that the petitioner could not be held in custody indefinitely on a defective warrant and without adequate proof of identity.

An application for a writ of *habeas corpus* or in revision might lead to the unconditional release of the petitioner, so that when the evidence and papers arrived in Ceylon (as the authorities hoped they would) the petitioner might not be in Ceylon to be rearrested. Therefore, the question arose how the petitioner could be prevented from leaving Ceylon before the proper proof arrived.

The Magistrate appears to have drawn the attention of the police officer to the provisions of s. 32 (1) (i) of the Criminal Procedure Code at which that officer appears to have grasped as a drowning man clutches at a straw.

This is how the record reads :—

> " In view of these submissions of counsel, Mr. Bandaranayaka (the police officer) *now* relies on s. 32 (1) of the Criminal Procedure Code read with the Fugitive Offenders Act, 1881, for the arrest of Kandasamy present in Court, or in support of an adjournment. *He does not now rely upon the warrant P1 already produced.* Mr. Bandaranayaka *now* moves under sec. 39 of the Criminal Procedure Code that R. A. Kandasamy present in Court be discharged on bail being furnished."

In other words, the police abandoned their claim for surrender under the Indian warrant. Until a proper warrant and sufficient evidence was received from India, the accused was to be deemed to have been arrested under s. 32 (1) (i) of the Criminal Procedure Code and released on bail under s. 39, so that he could not leave the Island although not under physical detention.

Of course, if this procedure is sanctioned by law there is nothing more to be said about it ; but the validity of the order made by the Magistrate in discharging the petitioner from arrest on his furnishing bail in Rs. 20,000 " to appear in Courts on September 28, 1946, and thereafter when directed on every date of adjournment of hearing at this Court and in the higher Court ", has been strongly called in question and criticised by Mr. Perera for the petitioner as a gross abuse of procedure and an invasion on the liberty of the subject.

I agree with Mr. Perera that when the police stated they were not proceeding under the Indian warrant P 1, the detention of the petitioner under that warrant came to an end. I think it is idle to suggest that the arrest of the petitioner on September 5, 1946, was both under the warrant P 1 as well as under s. 32 (1) (i) of the Criminal Procedure Code, and that while the detention under the warrant P 1 ceased, the detention under s. 32 (1) (i) continued. I also agree with Mr. Perera that there has not been a new arrest of the petitioner under s. 32 (1) (i)

after the police abandoned their case under the warrant P 1. The effect of that abandonment is that the petitioner automatically became free, and there has been no subsequent arrest.

To suggest that s. 39 of the Code applies (assuming it is an enabling section) is meaningless if the petitioner was not under lawful arrest when the order for bail was made.

Mr. Perera has taken the further objection that for the application of s. 32 (1) (i) certain conditions must exist at the time of the arrest. To justify the arrest of a person under that sub-section he must have been concerned in, or he must be one against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in any act committed in any place out of this Island, which if committed in this Island would have been punishable as an offence, and for which he is under the Fugitive Offenders Act, 1881, liable to be apprehended or detained in custody in this Island

There is no proof that at the time this petitioner was arrested on September 5, 1946, the arresting officer had such information, or that he made the arrest for any reason other than that he had an endorsed warrant P 1 authorising the arrest.

I hold that it is impossible to contend *ex post facto* that the arrest of this petitioner on September 5, 1946, was also made under s. 32 (1) (i) of the Criminal Procedure Code. There having been no subsequent arrest, the applicability of s. 39 is ousted.

I entertain doubts whether s. 39 of the Code is an enabling section at all. It merely declares the law. When a person is arrested, unless it is a case where police bail may be taken, the police officer can detain such person for twenty-four hours, after which it is his duty to take or send the man to the nearest Magistrate—s. 126A. It is then open to the Magistrate either to remand the suspect to the custody of the Fiscal or to admit him to bail. S. 39 merely draws attention to these provisions of the law to indicate that the police after making an arrest cannot themselves discharge the prisoner unless it is a case in which police bail can be taken.

In my opinion, the proceedings are irregular. It is for the Indian authorities to place the proper materials before our Courts. In order to enable them to do so, the local authorities and the Ceylon Courts will render every assistance lawfully possible. But to strain the law in the way that has been here attempted, in order to keep under control a person who may leave the Island before the escort and the perfected papers arrive is an encroachment on the liberty of the subject which cannot be countenanced.

If before the arrival of the escort armed with the proper papers the Indian authorities desire to have a suspected fugitive arrested or detained, the Act provides a simple procedure for the issue of a provisional warrant under s. 16 of the Act. This has not been done and I need not discuss the matter further.

I set aside the order of the Magistrate dated September 12, 1946, calling upon the petitioner to furnish security, and direct that the bail bonds be forthwith discharged, and that the petitioner shall be freed from all restraint so far as these proceedings are concerned.

Order set aside.