Privy Council Appeal No. 87 of 1944

Lala Jairam Das and others - - - - - - *Appellants*

v.

The King-Emperor - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH FEBRUARY, 1945

Present at the Hearing:

LORD RUSSELL OF KILLOWEN
LORD WRIGHT
LORD GODDARD
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* LORD RUSSELL OF KILLOWEN]

This appeal raises an important question, viz. whether a High Court in India has power to grant bail to a person who has been convicted and sentenced to imprisonment, and to whom His Majesty in Council has given special leave to appeal against his conviction or sentence.

The questions which arise for consideration in such a case are of such a nature that they can only, their Lordships think, be properly dealt with by some authority in India possessing either knowledge of the relevant facts, or the means of acquiring that knowledge; but whether a High Court in India has power to grant bail in the circumstances indicated is a matter upon which divers views have been expressed in the Courts in India, and which comes before the Board for the first time, in the following circumstances:—

The appellants were convicted under section 120B read with section 420 of the Indian Penal Code, and sentenced to terms of rigorous imprisonment. On appeal, the High Court of Lahore upheld the convictions but altered the sentences. The appellants, having obtained special leave from His Majesty in Council to appeal from the judgments of the High Court, applied to the High Court of Lahore to be released on bail. Their application was dismissed. From that dismissal they now appeal by special leave to His Majesty in Council. The application was dismissed upon the ground that the Judicial Committee had given no direction that an application for bail should be made to the High Court.

It will be convenient at the outset to review briefly the decisions in India.

In the year 1900 the High Court of Madras held (in a case in which special leave to appeal had been granted) that it had power to make an order for release on bail pending the decision of the appeal (see *Queen Empress* v. *Subrahmania Ayyar*, Ind. L.R. 24 Madras 161). On the petition for special leave, an application for bail had also been made, when the Judicial Committee stated that any such application must be dealt with by the High Court. The case was argued before the High Court

on the footing that the High Court could act under section 498 of the Code of Criminal Procedure (herein referred to as the Code). The judgment simply states—" In our opinion this Court has jurisdiction to make an order in this case releasing the accused on bail pending the decision of the Privy Council."

In the year 1908 in the case of *Diwan Chand* v. *King-Emperor* (Punjab Record, Criminal Judgments, No. 15, p. 50) the Chief Court, which had previously dismissed an appeal from their convictions by the accused persons, dismissed an application by them to be released on bail pending the hearing of a petition by them to His Majesty in Council for special leave to appeal. The application seems to have been based on section 498 of the Code; but it was held that section 498 " does not refer to a case where the Court is functus officio, but refers to cases where the Court has still some power left as regards the sentence of the accused," and that the Court had no power to release the accused on bail.

In February, 1923, the case of *Tulsi Telini* v. *Emperor* (I.L.R. 50 Calc. 585) came before the High Court of Calcutta. A convicted person applied under section 498 of the Code for a stay of execution of the sentence pending the hearing of a proposed application to His Majesty in Council for special leave to appeal. It was decided that the High Court had no jurisdiction under section 498. The Chief Justice indicated that the High Court might have had jurisdiction by reason of clause 41 of the Court's Letters Patent if the case had come within that clause, which it did not. Richardson J. distinguished the Madras case on the ground that in that case special leave to appeal had already been obtained. He was of opinion that the Court had no jurisdiction under section 498 to grant bail pending an application for special leave to appeal. The Court was functus officio, and had no seisin of the case. Nor had the Court any inherent jurisdiction. He pointed out however that it was open to the Local Government to suspend the sentence under section 401 of the Code.

On the 2nd April, 1923, the Code of Criminal Procedure (Amendment) Act, 1923, came into force by which there was added to the Code section 561A which runs thus:—

> " 561A. Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

In 1926, in the case of *Emperor* v. *Ram Sarup* (Ind. L.R. 49 Allahabad 247) the High Court of Allahabad held that " a High Court has certainly inherent jurisdiction to stay execution of its own order when the ends of justice require it." It refused to grant bail at that stage because special leave to appeal had not yet been obtained; a petition had been lodged but had not been heard by the Judicial Committee. The applicant however was told to apply again, when leave to appeal had been granted.

In 1936 another case came before the High Court of Calcutta, viz. *Babu Lal Chokhani* v. *Emperor* (I.L.R. (1937) 1 Cal. 464) in which it was held that after disposal of a criminal appeal the High Court is functus officio and has no seisin of the case, and cannot grant bail to a convicted person before leave to appeal has been granted by His Majesty in Council. The decisions in 24 Madras and 49 Allahabad were distinguished on the ground that they were decisions given on the footing that leave to appeal had been or would be obtained. The application for bail had been refused by the High Court of Calcutta, who gave their reasons at a later date. Cunliffe J. in his judgment mentions the fact that in the interval a suspension order had been made by the Local Government under section 401. Henderson J. (differing from the view expressed in the Allahabad case) was of opinion that section 561A had no reference to bail, which was a matter specifically provided for by the Code itself. It appears (from the judgment of Blacker J. in a later case) that, special leave to appeal having been subsequently obtained, a Single Bench Judge did in fact grant bail to Babu Lal Chokhani.

In the same year the matter came under the consideration of the High Court of Nagpur in the case of *Bashiruddin* v. *King-Emperor* (I.L.R. (1937) Nagpur 236). The High Court, on an appeal from an acquittal,

had convicted a person charged with an offence under section 420 of the Indian Penal Code. He applied for bail pending an application to His Majesty in Council for leave to appeal. It was held that after signing judgment convicting the accused the High Court was functus officio, and had thereafter no power to release him on bail unless special leave to appeal was granted. The application was therefore refused " for the present," because no directions had been received from their Lordships of the Privy Council. Bose J. who delivered the judgment of the Court, repudiated the idea of the High Court possessing any inherent jurisdiction to grant bail. The question of bail had been expressly dealt with by the Code, " and although the matter of bail pending an appeal to the Judicial Committee is not there, its provisions on the subject must be regarded as exhaustive."

Finally in 1937 an application for bail was made to the High Court of Lahore by a convicted person who had obtained special leave to appeal from His Majesty in Council; but no direction had been given as to applying for bail to the High Court. It was decided that once the High Court had passed orders in a criminal appeal it was functus officio and had no seisin of the case, but that the seisin might be revived when the Judicial Committee gave leave to appeal and directed the High Court. Blacker J. in delivering judgment said that he had no power to grant bail because in granting leave to appeal the Judicial Committee had given no direction to apply to the High Court for bail. He dismissed the application but stated—" it can in my opinion be revived if the petitioner obtains and produces any direction from their Lordships of the Privy Council in the matter which would authorize this Court to go into the question of bail."

In the present case, the appellants' application to be released on bail pending the decision of their appeal to His Majesty in Council was dismissed by the High Court of Lahore (following the last mentioned case) on the ground that their Lordships had given no " direction to the High Court to entertain an application for bail."

From this review of the authorities in India it would appear that the various views which have prevailed may be summarised thus: (1) if leave to appeal has been obtained from His Majesty in Council and the Judicial Committee has said that an application for bail must be dealt with by the High Court, the High Court will have power under section 498 of the Code to release a convicted person on bail pending the hearing of the appeal; (2) the High Court has an inherent power to do so if special leave to appeal has been obtained from His Majesty in Council; (3) the High Court possesses no inherent power as regards bail; (4) after disposal of a criminal appeal by the High Court it is functus officio, has no longer any seisin of the case, and cannot grant bail to a convicted person unless special leave to appeal has been obtained from His Majesty in Council; (5) in addition there must also be a direction received from " their Lordships of the Privy Council "; (6) the High Court's seisin of a criminal case, and its power to grant bail under section 498 of the Code, is revived when the Judicial Committee gives leave to appeal and directs the High Court.

Their Lordships are unable to recognise any proceeding or conduct on their part in the past which can be properly described as a " direction to a High Court to entertain an applicaition for bail." When any suggestion of bail has been mooted on behalf of a successful petitioner for special leave to appeal against his conviction, their Lordships have always refused to consider the matter, and have no doubt at times said that the question of bail could only be properly and satisfactorily dealt with in India. But they have never given any formal direction to a High Court on the matter, nor has any reference to bail been made in Orders in Council granting leave to appeal.

Moreover their Lordships find it impossible to appreciate how any suggestion or direction by them in regard to an application for bail to the High Court, made or given when they decide to advise His Majesty that special leave to appeal from a sentence or conviction should be granted, can in any way determine or affect the question under consideration on

this appeal. The High Court either does possess power to grant bail in the given circumstances or it does not. If it possesses the power it possesses it independently of any suggestion or direction made or given by their Lordships. If it does not possess it, no suggestion or direction made or given by their Lordships could confer such a power. So far as any decision in India is based upon the fact that such a suggestion was made or direction given, or that no such suggestion was made or direction given, it cannot be supported on that ground alone.

There remains for consideration the question whether the alleged existence of a power in a High Court to grant bail in the stated circumstances can be established on other grounds. If it exists it must be either because it was conferred on the High Courts by the Code, or because it is one of those inherent powers which are referred to in section 561A of the Code.

So far as the provisions of the Code are concerned, their Lordships can discover nothing therein to justify the view that any such power is thereby conferred on a High Court. The question of bail is dealt with in Part IX of the Code (" Supplementary Provisions ") under Chapter XXXIX which is entitled " Of Bail." The only granting of bail which is referred to in that chapter (which consists of sections 496 to 502 inclusive) is the granting of bail to accused persons. There is no reference therein to the granting of bail to persons who have been tried and convicted. It is true that in the Indian decisions, section 498 seems to have been treated as though it included cases in which persons already convicted were concerned; but any such view seems to their Lordships to be a misapprehension based upon a mistaken reading of a few words which occur in that section. The section runs thus:—

> " 498. The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive; and the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police-officer or Magistrate be reduced."

Two things must be observed in relation to this section. The only bonds " executed under this chapter " are executed by persons who are accused (not convicted) persons; and the words " whether there be an appeal on conviction or not " merely qualify or relate to the words " in any case," and only mean that all accused persons are within the section whether their case is appealable on conviction or not. In truth the scheme of Chapter XXXIX is that sections 496 and 497 provide for the granting of bail to accused persons before trial, and the other sections of the chapter deal with matters ancillary or subsidiary to that provision. The only provision in the Code which refers to the grant of bail to a convicted person is to be found in section 426. Section 426 forms part of Chapter XXXI of the Code which is entitled " Of Appeals " and is included in Part VII of the Code (" Of Appeal, Reference and Revision "). The section is in these terms:—

> 426. (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.
>
> (2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.
>
> (3) When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

A consideration of section 426 reinforces the view that section 498 has no reference to convicted persons; for if they were covered by section 498 it would confer upon the Court of Session a power to grant bail to a convicted person appealing to the High Court, a power which under section 426 is confined to the High Court. Their Lordships feel no doubt that the Code confers no power on a High Court to grant bail in the case of a convicted person, and the fact that he has obtained leave from His Majesty in Council to appeal from his conviction or sentence makes no difference in this regard.

If such a power exists in a High Court it can only be as a power inherent in a High Court, because it is a power which is necessary to secure the ends of justice. It must be observed that, as decided by Hallett J., after a careful and exhaustive review of the authorities, that no such inherent power exists in the High Court of Justice in this country (*ex parte Blyth* (1944) 1 K.B. 532). In a case (reported only in the "Weekly Notes") Branson J. appears to have made an order granting bail to a prisoner (in this country) who had been sentenced to 6 months' imprisonment in Cyprus but had been given leave by His Majesty in Council to appeal (*Sutton* v. *Reg.* (1932) W.N. 272). The order however seems to have been made with the consent of the Secretaries of State for Home Affairs and for the Colonies, and cannot be relied upon as any authority for the view that a Judge of the High Court has any inherent power to grant bail in the circumstances indicated. When such power exists it is statutory.

It is perhaps conceivable that such an inherent power might exist in the High Courts in India, but historically it would seem unlikely in view of the provision found in the early Charters, which confer powers on the judges in India by reference to the powers of the Justices of the King's Bench in England in terms such as the following—"and to have such jurisdiction and authority as Our Justices of Our Court of King's Bench have and may lawfully exercise within that part of Great Britain called England, as far as circumstances will admit." Section 561A of the Code confers no powers. It merely safeguards all existing inherent powers possessed by a High Court necessary (among other purposes) to secure the ends of justice.

But other difficulties exist in the way of establishing that any such inherent power exists in a High Court. A power to grant bail to convicted persons would, if exercised, interrupt the serving of the sentence; the period of bail might even cover the whole of its term. A power to grant bail would not include a power to exclude the period of bail from the term of the sentence: that this is so is shown by the fact that it was necessary to enact the special provision which is contained in subsection 3 of section 426 of the Code. Under these conditions the exercise of a power to grant bail would, in the event of the appeal being unsuccessful, result in defeating the ends of justice. Moreover in the same event it would result in an alteration by the High Court of its judgment, which is prohibited by section 369 of the Code. Finally their Lordships take the view that Chapter XXXIX of the Code together with section 426 is, and was intended to contain, a complete and exhaustive statement of the powers of a High Court in India to grant bail, and excludes the existence of any additional inherent power in a High Court relating to the subject of bail. They find themselves in agreement with the views expressed by Richardson J., Henderson J. and Bose J. in the three cases referred to earlier in this judgment.

It may well be that the case of an appeal from a High Court to His Majesty in Council was not within the contemplation of the framers of the Code. It may well be that a power to grant bail in such a case would be a proper and useful power to vest in a High Court. Their Lordships fully appreciate the propriety and utility of such a power, exerciseable by judges acquainted with the relevant facts of each case, and (if exercised) with power to order that the bail period be excluded from the term of any sentence. But in their Lordships' opinion this desirable object can only be achieved by legislation.

In the meantime there is a section of the Code to which, pending legislation, recourse may be had, and by means of which the ends of justice may be secured, viz. section 401 which enables the Provincial Government to "suspend" the execution of a sentence. As hereinbefore appears recourse has been had to this section on previous occasions.

For the reasons indicated their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed. In view of the general importance of the question which has been raised and decided their Lordships make no order as to the costs of this appeal.

(39591) Wt. 8060—28 180 2/45 D.L. G. 338.

In the Privy Council

LALA JAIRAM DAS AND OTHERS

v.

THE KING-EMPEROR

DELIVERED BY LORD RUSSELL OF KILLOWEN

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