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ASGAR ALI

v.

REGINAM

B [SUPREME COURT, 1964 (Mills-Owens C.J.), 29th October, 20th November]

Appellate Jurisdiction

C *Criminal law—bail pending appeal to Supreme Court by convicted person—refusal of bail by Magistrate's Court—no appeal against refusal —right of fresh application to Supreme Court—Criminal Procedure Code (Cap. 9) ss.3(3), 43(2), 118, 158, 206, 314(1), 321(1), 329—Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo. V, c.49) (Imperial) s.31(1) (i)—Supreme Court of Judicature Act 1873 (36 & 37 Vict., c.66) (Imperial)—Magistrates' Courts Rules 1952 (Imperial) r.9—Rules of the Supreme Court (Imperial) 0.54 rr.1, 2—Indian Criminal Procedure Code (V of 1898)—Tanganyika Criminal Procedure Code 1945, ss.52, 132, 174, 312.*

D *Criminal law—practice and procedure—bail pending appeal to Supreme Court—no appeal from refusal by magistrate—fresh application to Supreme Court—Criminal Procedure Code (Cap. 9) ss.314(1), 321(1).*

Appeal—no appeal lies from refusal by Magistrate's Court of bail pending appeal to Supreme Court.

E Under section 321(1) read with section 314(1) of the Criminal Procedure Code, a convicted person has no right of appeal from a refusal of bail by the court which convicted him, pending appeal by that person. Upon refusal of bail pending appeal by the Magistrate's Court a convicted person may make a fresh application to the Supreme Court.

Isad Ali v. R. (1958) 6 F.L.R. 1, not followed.

F Cases referred to: *Nemchand Govinji v. R.* (Kenya—C.A. No. 236 of 1954): *Kennard v. Simmons* (1884) 50 L.T. (N.S.) 28: *Barnado v. Ford, Gossage's Case* [1892] A.C. 326: Ex parte Blyth [1944] K.B. 532; [1944] 1 All E.R. 587: *Ex parte Speculand* [1946] K.B. 48; 174 L.T. 334: *Lala Jairam Das v. King Emperor* (1945) 61 T.L.R. 245: *Nassor v. R.* (1945) 1 Tanganyika L.R. (Revised) 289: *Attorney-General v. Sillem* (1864) 10 H.L.C. 704; 11 E.R. 1200: *National Tele-* G *phone Co. Ltd. v. Postmaster General* [1913] 2 K.B. 614: *Vichitra Singh and another v. R.* (1958) 6 F.L.R. 5.

Appeal against refusal of bail by Magistrate's Court.

F. M. K. Sherani for the appellant.

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B. A. Palmer for the Crown.

MILLS-OWENS C.J.: [20th November, 1964]—

The question raised in these proceedings is whether a person convicted in the Magistrate's Court who has been refused bail by that Court pending appeal may appeal against such refusal to the Supreme Court.

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The statutory provisions on which the question mainly depends are sections 314(1) and 321(1) of the Criminal Procedure Code, which read as follows :—

> "314(1). Save as hereinafter provided, any person who is dissatisfied with any judgment, sentence or order of a magistrate's court in any criminal cause or matter to which he is a party may appeal to the Supreme Court against such judgment, sentence or order:
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> Provided that no appeal shall lie against an order of acquittal except by, or with the sanction in writing of, the Attorney-General.
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> 321(1). Where a convicted person presents or declares his intention of presenting a petition of appeal the Supreme Court or the court which convicted such person may if in the circumstances of the case it thinks fit, order that he be released on bail, with or without sureties, or if such person is not released on bail shall, at the request of such person, order that the execution of the sentence or order against which the appeal is pending be suspended pending the determination of the appeal. If such order be made before the petition of appeal is presented and no petition is presented within the time allowed the order for bail or suspension shall forthwith be cancelled."

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For the past six years or so it has been the practice to regard the position as settled by the decision of the then Chief Justice (Sir George Lowe) is the case of *Isad Ali v. R.* (1958) 6 Fiji L.R. 1. At least that decision has not been directly challenged until now. It was held that the correct procedure was to appeal against the Magistrate's refusal, not to make a fresh application to the Supreme Court. The judgment of the learned Chief Justice proceeded on the basis that the decision of a Magistrate refusing bail was an 'order' within the meaning of the expression "judgment, sentence or order" contained in section 314(1); section 321(1) permitted an application for bail pending appeal to be made to either the convicting Court or the Supreme Court, and, so it was held, it was for the applicant to elect to which forum he would make his application; if he chose to make application to the Magistrate's Court and was refused the refusal stood until reversed on appeal; until reversed it was an extant order; it was an 'order' within the meaning of section 314(1) because it was in the nature of a final order, not one merely collateral to substantive proceedings; the fact that successive applications might be made for bail did not affect the conclusion arrived at—it would merely come about that a fresh and entirely separate and independent application would be before the Court, also for final disposal; support for the conclusion was to be found in the Kenya case of *Nemchand Govinji v. R.* (C.A. No. 236 of 1954). The foregoing are the main grounds of the decision.

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It would appear that much of the argument had centred around the meaning of the term 'order', with some reference also to the English procedure in the matter of bail. Here I think it is important to bear in mind that English authorities will not always be of assistance. Thus the question whether an order is a 'final' order, in the English law, arises mainly in the context of section 31 (1) (i) of the Judicature Act, 1925 under which leave is required to appeal to the Court of Appeal in the case of an interlocutory order but not in the case of a final order. Likewise under the Summary Jurisdiction Acts the term 'order' is almost invariably used in relation to civil proceedings—an 'order' following on a complaint, whereas a conviction follows on an information (vide *Kennard v. Simmons* (1884) 50 L.T. (N.S. 28, 29)). An analogy may, however, be found in *Barnado v. Ford, Gossage's case* [1892] A.C. 326 where the question was whether the grant of a writ of habeas corpus was an 'order' appealable under the Judicature Act, 1873. Lord Herschell said, at pp. 336-7 —

> "It was urged that it was merely a direction by the Court or a judge that a process of the Court should issue, and that from such an order or direction no appeal could lie. At the close of the argument I was disposed, in common I believe with those of your Lordships who heard the appeal, to accede to this view; but subsequent consideration has led me to the conclusion that it cannot be sustained."

I quote this merely to illustrate the present problem and the basis of the argument in Isad Ali's case.

It is important also, in my view, to observe that little, if any, assistance is to be obtained from the English authorities with respect to the jurisdiction to grant bail. The English High Court possesses an inherent power to grant bail, except where the applicant is 'in execution' that is to say a judge may grant bail in any case except where the applicant has been convicted and is under sentence (*vide Ex parte Blyth* [1944] K.B. 532; and *Ex parte Speculand* [1946] K.B. 48) — subject, of course, to any statutory restriction such as in the case of treason. The High Court's jurisdiction is not to hear an appeal against a refusal but an original jurisdiction to hear a further application for bail; thus Rule 9 of the Magistrates' Courts Rules, 1952 provides that the committing justices shall inform the accused of his right to 'apply' for bail to a judge of the High Court, and such an application is made *ex parte* (R.S.C. Order LIV rr. 1 & 2). In the Privy Council case of *Lala Jairamdas v. King Emperor* (1945) 61 T.L.R. 245 it was held that the Indian Criminal Procedure Code provided a complete and exhaustive statement of the powers of the Indian Courts as to bail. The provisions of section 3 (3) of the Fiji Code (Cap. 9) lead, no doubt, to the same result.

It is clear therefore that the matter is primarily one of construction of the Code, in particular of the sections quoted above.

Crown Counsel has cited the case of *Abdullah Nassor v. R.* (1945) 1 Tanganyika L.R. (Revised) 289, decided on the corresponding sections in the Tanganyika Code, which are in almost precisely the same terms, the main difference being that the expression used in the appeal

section of the Tanganyika Code, section 312, is "finding, sentence or order". There it was held that the expression 'order', in the appeal section (our section 314 (1)), must be read *ejusdem generis* with the preceding words: "finding, sentence or . . .". The learned judge in that case (Wilson J.) pointed to another section, namely the section corresponding to our section 206 — A

> "206. The court having heard both the prosecutor and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law or shall acquit him or make an order under the provisions of section 38 of the Penal Code." B

This section, he held, indicated the nature of the type of 'order' to which the appeal section applied, that is to say an order in the nature of the determination of a case. Further, he went on to say —

> "I am fortified in taking this limited view of the nature of orders against which section 312 gives a right of appeal by the fact that there are other orders in the Code against which a specific right of appeal is given. Examples are orders in connection with forfeiture of recognizance (section 132), orders to give security for good behaviour (section 52) and orders for costs against an accused or a private prosecutor (section 174). These specific provisions for a right of appeal would be wholly unnecessary and superfluous if the word 'order' in section 312 included every order made by a subordinate Court in the course of or in connection with criminal proceedings which is the argument put forward by counsel in this case. C D
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> No right of appeal against an order of a magistrate refusing bail is conferred by section 312 Criminal Procedure Code, 1945, and no other provision of the Code or other law giving such a right has been quoted to me. I hold therefore that there is no such right of appeal, for it is well settled that appeal is a creature of statute and does not lie unless the right is expressly conferred by law (*Attorney-General vs. Sillem* (1864) 10 H.L.C. 704 and *National Telephone Co., Ltd. vs. Postmaster-General* [1913] 2 K.B. 614)." E F

The corresponding sections in our Code, that is to say the sections which make express provision for appeals against orders *simpliciter*, are sections 118 (recognisances); 43 (2) (orders to give security for good behaviour); and 158 (orders as to costs).

Of the two decisions, that of the Chief Justice in *Isad Ali v. R.* (supra) and that of Wilson J. in *Abdullah Nassor v. R.*, I am bound to say that I prefer the latter. The reliance placed in Isad Ali's case on the decision in the Kenya case of *Nemchand Govinji v. R.* was unmerited, for the reason, as appears from the judgment itself, that the Kenya Code contained, in the section corresponding to our section 321 (1), an express provision for an appeal against a Magistrate's refusal of bail. There existed, therefore, both a concurrent and an appellate jurisdiction in the Supreme Court, by express provision. In the absence of express provision, in my view, it would be difficult G H

to justify a construction which resulted in the finding of both a concurrent and an appellate jurisdiction in the same cause or matter. The judgment in Isad Ali's case attempts to rationalize the existence of the dual jurisdiction by holding that the convicted person must
A elect whether to apply to the Magistrate's Court or to the Supreme Court; if he elects to apply to the Magistrate's Court, in effect, as it was held, he forfeits his right to make a further application to the Supreme Court, although, as it was conceded, successive applications for bail are permissible. Such a construction, in my view, is not
B acceptable, particularly in a matter affecting the liberty of the subject; a right to make an original application to the Supreme Court might well be better than a right to appeal to the Supreme Court which might hesitate to differ from the Magistrate in a sphere where discretion plays such a large part. On a different aspect, to hold that a refusal of bail is an appealable 'order' within the meaning of section 314(1) must lead to the conclusion that there is jurisdiction to
C exercise the statutory powers of revision under section 329 in the case of such an order because almost precisely the same expression is employed in the relevant sections — "judgment, sentence or order" — in section 314(1); "finding, sentence or order" in section 329. Again, if an appeal lies, under section 314(1), against the refusal of bail it must lie against the grant of bail. The judgment in Isad Ali's case appears to have recognised this difficulty, with the comment,
D at p. 3 —

> "The only apparent remedy of the Attorney-General would be to appeal against the Magistrate's order under section 314(1) of the Criminal Procedure Code. It seems, on the face of it, anomalous that an accused could go from one court to another in order to pursue an application for bail and might in the process
E fail to disclose a prior refusal of bail, whereas the Attorney-General would be precluded from adopting the same procedure had bail been granted by a Magistrate in the first instance."

No doubt what was being pointed out was that whilst an applicant might fail to disclose a previous unsuccessful application, the Attorney-General, in the nature of the case, would be faced with a
F disclosed successful application. Clearly, a right in the prosecution to appeal against the grant of bail would be a most unusual provision; one for which, in my view, express provision in no uncertain terms would be sought.

In holding that the convicted person must elect, it was said in the course of the judgment in Isad Ali's case that —

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> "If his trial was in the Supreme Court any such application must necessarily be made to that Court. The wording of section 321 (1) 'the Supreme Court or the court which convicted such person may . . . order that he be released on bail' makes that abundantly clear."

But section 321(1) does not apply to the case where the conviction
H is had in the Supreme Court.

Notwithstanding the principle of comity and the fact that the decision in Isad Ali's case has stood unchallenged for the past six years,

I feel bound, with respect, to differ from the judgment of the learned Chief Justice in that case, and to hold that no right of appeal exists from a refusal of bail to a convicted person pending appeal; a fortiori from an order granting bail. Crown Counsel concedes that on a refusal of bail by the Magistrate's Court the convicted person may make a fresh application to the Supreme Court, and *vice versa*, and that appears to me to be the correct position. The position in the case of bail pending appeal accords, as I hold, with the position where bail is sought pending trial *(vide Vichitra Singh and Nabab Singh v.* R. (1958) 6 Fiji L.R. 5). And, as I see it, it is a proper result that the Supreme Court should have an original, not an appellate, jurisdiction in such a matter.

Accordingly this appeal is dismissed.

Appeal dismissed.