In Re: S.M. Nathaniel

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Judge : Rajamannar, C.J., ; Horwill and; Rajagopalan, JJ.

Appellant : In Re: S.M. Nathaniel

Judgement :

Rajamannar, C.J.

1. The appellants in the above appeals were accused 1 to 4 in case No. 10 of 1948 at the first criminal sessions of this Court in the year 1948. All the four appellants were found guilty by a majority of the jury of the offence of conspiracy to murder the late Dr. Habibulla, The appellants in criminal Appeal No. 183 of 1948 were found also guilty of murdering him, while the appellants in criminal Appeal Nos. 188 and 182 of 1948 were found guilty abetting the murder. The majority verdicts of the jury were accepted by Bell J. who tried the case, and they were sentenced to death. The appeals were pro-ferred under Section 411A, Criminal P. 0., which bad been added to the Code by Act xxvi [26] of 1948, with the leave of the appellate Court on matters of law and fact. The appeals came up for hearing before Horwill and Govinda Menon JJ. The learned Public Prosecutor raised a preliminary objection that the appeals were not maintainable, because Act xxvi [26] of 1913 was invalid as being ultra vires of the Central Legislature, which had enacted it. As the learned Judges felc that it was desirable that the preliminary

objection should be considered by a Full Bench, the papers were placed before me, and this Full Bench was constituted to hear the preliminary objection. At the hearing before us, the learned Advocate General appeared on behalf of the Provincial Government and argued in support of the preliminary objection.

2. Before the passing of Act xxvi of 1943, the provisions of law relating to the conviction and sentence or acquittal by the High Court at ita criminal sessions were as follows: Under Clause 26, Letters Patent, there was no appeal to the High Court from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said Court. But it was in the discretion of any such Court to reserve any point or points of law for the opinion of the High Court. When such-point or points of law were be reserved, or, if it was certified by the Advocate-General that, in his judgment, there was an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction or that a point or points of law which has or have been decided by the said Court Should be further considered, the High Court bad full power and authority to review the ease, or 3uch part of it as may be necessary, and finally deter, mine such points or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass Such judgment and sentence as may seem fit. The Criminal Procedure Code did not contain any provision conferring a right of appeal from a sentence or order passed by the High Court in exercise of its original jurisdiction except in cases specified in Section 449 which ran thus:

(1) Where:

(a) a case is tried by jury In a High Court or Court of Session under the provisions of this Chapter, or

(b) a case which would otherwise have been tried under the provisions of this Chapter is under this Code committed to or transferred to the High Court and is tried by jury in the High Court, or

(c) a case is tried by jury in the High Court in a Presidency-town and the High Court grant3 leave to appeal on the ground that the case would, if it bad been tried

outside a Presidency-town, have been triable under the provisions of this Chapter, then, notwithstanding anything contained in Section 418 or 8.423, Sub-section (2), or in the Letters Patent of any High Court, an appeal may lie to the High Court on a matter of fact as well as on a matter of law.

(2) Notwithstanding anything contained In the Letters Patent of any High Court, the Provincial Government ma; direct the Public Prosecutor to present an appeal to the High Court from an original order of acquittal passed by the High Court in any such trial as is referred to in Sub-section (1).

(3) An appeal under Sub-section (1) or Sub-section (2) shall, where the High Court oonsiBta of more than one Judge, be heard by two Judges of the High Court.

By Act XXVI [26] of 1948 passed by the Indian Legislature, Section 411A was inserted after Section 411 of the Code, providing for appeals against convictions and acquittals on trials held by a High Court in the exercise of its original oriminal jurisdiction, notwithstanding anything contained in the Letters Patent of any High Court, and with-out prejudice to the provisions of Section 4-19, Section 7 of that Act, inter alia, also declared that ols. 26, 26 and 41, Letters Patent, for the High Courts at Bombay, at Madras, and at Fort William in Bengal, shall cease to have effect.

3. The legislative powers of the Central and Provincial Legislatures are contained in the provisions of part 5, Government of India Act, 1935. Section 99 (l) declares that the Federal Legislature (corresponding to the Central Legislature) may make laws for the whole or any part of British India, and a Provincial Legislature may make laws for the Province or any part thereof. The subjects with respect to which these two Legislatures have power to make laws are in-dioated in Section 100 which runs thus:

(1) Notwithstanding anything in the two next succeeding sub-seetions, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List 1 in Schedule 7 to this- Act. (hereinafteroalled the'Federal Legislative List').

(2) Notwithstanding anything in the next succeeding Sub-eeotion, the Federal Legislature, and, subject to the preceding sub-section a Provincial Legislature also have power to make laws with respect to any of the matters enumerated in List 3 in the said schedule (hereinafter oalled the 'Concurrent Legislative List').

(3) Subject to the preceding sub-sections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List 2 in the said schedule (hereinafter called the 'Provincial Legislative List').

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof.

It is clear from this section that if the subject-matter of Act xxvi [26] of 1943 is one of the matters enumerated in List 1 or in List 3 in Schedule 7 to the Act, then the Central Legislature is perfectly competent to pass the said enactment. If it is not, then, prima facie the Central Legislature has no such power, according to the provisions of this section. I do not think there is any substance in the contention of Mr. K. S. Jayarama Ayyar the learned advocate who appears on behalf of accused 1 that under Sub-section (4) of Section 100 the Central Legislature has power to make a law with respect to a matter enumerated in the Pro. vineial Legislative List, if that law is made not for a Province or any part thereof but for all the Provinces or for more than one Province. 'Province' is defined in Section 46 (8) of the Act as 'a Governor's Province,' that is to say, 'Province' would not include what are described as 'Chief Commissioner Provinces' in part 4 of the Act, which do not have Legislatures. For these latter Provinces, the Federal or Central Legislature would have power to make laws, even with respect to matters enumerated in the Provincial Legislative List, Any other construction would lead to the absurd result of altogether destroying the difference between the several lists, Federal, Concurrent and Provincial. In my opinion, Section 100 (4) empowers the Federal or Central Legislature to make laws with respect to matters enumerated in the Provincial Legislative List only for areas other than the Governor's Provinces.

4. It was common ground that the subject-matter of Act xxvi [26] of 193 is not covered by any of the entries in List 1, the Federal Legislative List. It was contended by the learned Advocate-General that it falls within the scope of Entries 1 and 2 of List 2, the Provincial Legislative List,and that it does not fall within Entries 2 and IS of List 8, Concurrent Legislative List, as contended by the counsel on behalf of the accused. Naturally, the contest ranged mostly around the interpretation to be placed on the language of Entry 2 of the Concurrent Legislative List, which runs thus: 'Criminal Procedure including all matters included in the Code of Criminal Procedure at the date of the passing of this Act.' On the one hand, the learned Advocate. General argued that the subject-matter of Act XXVI [26] of 1948 was neither criminal procedure, nor a matter included in the Code of Criminal Procedure, On the other hand, counsel for the accused argued that it was criminal procedure, and even if it were not, it was certainly a matter included in the Code of Criminal Procedure at the date of the passing of the Government of India Act.

5. Procedure, though a familiar word, is a word of uncertain and indefinite import. Jurists have found difficulty in defining exactly what procedure comprises, and where the line of distinction should be drawn between procedural or adjectival law and substantive law, Salmond describes the true nature of the distinction thus:

The law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of notions jus quod ad actions pertinet using the term action in a wide sense to include all legal proceedings, civil oc criminal. All the residue is substantive law, and relates, not to the process of litigation but to its purposes and subject-matter. Substantive law is concerned with the ends which the administration of justice seeks ; procedural law deals with the means and instruments by which those ends are to, be attained. the latter regulates the conduct and relations of Courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated.

The learned author points out the error in des-oribing substantive law as that which defines the right, and procedural law, as that which deter, mines the remedies. In this context, he says:

This application, however, of the distinction between jus and remedium is inadmissible. For, in the first place, there are many rights which belong to the sphere of procedure; for examble, a right of appeal, a right to give evidence on one's own behalf, a right to interrogate the other party, and so on. In the second place, rules defining the remedy may be as much a part of the substantive law as are those which define the right iteelf.

The learned Advocate General invited our attention to the well-known class of oases in which it has been held that a right of appeal is a sub. stantial and vested right, which would not be presumed to have been taken away, by retrospective operation of a statute, passed after the accrual of such a right. (Colonial'Sugar Befin-ing Co, v. Irwing 1905 A. 0. 369 : 74 L. J. .p. 0. 77. It has been pointed out again and again in these cases that a right of appeal is not such a right of mere procedure which could be adversely affected retrospectively. In my opinion, no assistance can be derived from this class of cases, because an appeal may be a valuable and substantial right, and in practice almost equivalent to a rule of substantive law. Nevertheless, in form, it may belong to the category of procedure. In Venugopala Beddiar v. Krishnaswami Beddiar 6 P. L. J. 47 : A.I.R. 1913 V. c. 24. Varadaohariar J. says:

In one sense, a right of appeal may be spoken of as a matter of procedure and it is usually provided for in Codes relating to Procedure.

The following passage from Salmond on Jurisprudence, 8th Edn. at p. 497, is apposite in this connexion:

Although the distinction between substantive law and procedure is sharply drawn in theory, there ara many rules of procedure whioh, in their praotioal operation, are wholly or substantially equivalent to rules of substantive law. In such cases the difference between these two branches of the law is one of form rather than of substance.

Now, we are here called upon to construe the word 'procedure' to find out what it was intended to comprise as subject-matter with respect to which a Legislature can make laws. We are not called upon to construe it to find out if a particular

matter is a matter of procedure so as to exclude the presumption against retrospective operation of a rule affecting it. It may be that several matters would be comprised within the defini-tion of procedure, which would nevertheless be matters relating to substantial rights of parties, with respeot to which retrospective operation may not apply.

6. Mr. Jayarania Ayyar argued that the subject-matter of 'appeals' baa always been in-oluded in the Procedure Codes, Civil and Criminal, in the continuous course of legislation in India, and that such legislative practice Qftri.Jbe. utilised as a useful guide in the interpretation of the descriptive terminology adopted in the Constitution Act, and particularly in the Lists in Schedule vil. In In re G. P. and Berar Sales of Motor Spirit and Lubricants Taxation Act , Gwyer C. J. accepted this as legitimate. He said:

Lastly I am entitled to look at the manner in which Indian legislation preceding the Constitution Act had been accustomed to provide for the collection of excise duties; for Parliament must surely be presumed to have had Indian legislative practice in mind and unless the context otherwise dearly requires, not to have conferred a legislative power intended to be interpreted in a sense pot underBtood by thoae to whom the Act. was to apply.

In the same ease, Sulaiman J, referred to the following observations in E. E, Graft v. Syevester Dumphy 1998 A. c. 166 : A.I.R. 1988 P. 0.16:

When a power is conferred, to legislate on a particular topic it is important, in determining the scope of the power to have regard to what is ordinarily treated as embraced within that topio in legislative practice, and particularly in the legislative practice of the State which has conferred the power.

In Sir Byramji Jeejeebhoy v. The Province of Bombay 3 F. L. j. 25 : A. I. R. 1940 be m. 66., the learned Judge of the Bombay High Court applied the same rule. Kania J,, as he then was, after citing from Craft v. Dumphy 1983 A. 0. 156 : A. I. R. 1933 P. 0, 16, said:

These observations show that in construing the words used in the Constitution Act the powers of the Imperial Parliament which paseed the Act. and its practice have to be be rne in mind in ascertaining the meaning of the words used in the Constitution Act.

There can be no doubt that the provisions re-garding appeals have always found a place in Codes of Procedure. Part VII, Criminal P. C, as it stood on the date of the passing of Constitution Act, dealt with 'appeal, reference and revision.' I think it is reasonable to presume that the framers of the Constitution Act intended to convey by the words 'criminal procedure' used in entry 2 of List HI all that was commonly being treated as part of criminal procedure in the legislative enactments of the Indian Legislatures, before the date of the Constitution Act.

7. The learned Advocate-General relied strongly on the decision of the House of Lords in the Attorney-General v. Herman James Sillem (1863) 10 H. L. C. 704 : 11 E. E. 1200 and certain observations therein. In that case, the validity of rules made by the Barons of the Court of Exchequer under Section 26, Queen's Remembrancer's Act, conferring a right of appeal in motions on the revenue side of the Exche-quer, came up for decision. Under Section 26 of the Act, the Barons had the power to make rules and orders as to the 'process, practice and iiriode*.. of pleading on the revenue side of the Court.' It was held by the Court, by a majority, that the rules were void, because the words, 'process, practice, and mode of pleading' were not used in the abstract, but with reference to existing Courts, and that 'practice' meant the rules which guide the mode of proceeding within the walls of the Court itself. The creation of a right of appeal was an act which required legislative authority, and neither the inferior nor the superior tribunal, nor be to combined, could create such a right, it being essentially one of the limitation and extension of jurisdiction. The judgment of the Lord Chancellor (Lord West, bury), rested on the fundamental juristic conception that the creation of a new right of appeal required legislative authority because the Court from which the appeal is given and the Court to which it is given must be to be be und, and that can be only by the act of some highar power. It was not competent to either tribunal or be to Collectively to create such rights. A power to regulate the practice of a Court 'dosa not involve or imply any power to alter the extent or

nature of its jurisdiction.' After holding that the words 'process, practice and mods of pleading' occurring in the two places of the section should be given the same meaning, the learned Lord Chancellor proceeded to say:

Taking, then, the word 'practice'as equivalent to . the cursus curim, or regulation of proceedings within the Court itself, the question is whether Sections 34, 35 and 36 of the Act. of 1854. can, with any propriety of language, be denominated provisions of rules respecting process, practice, and mode of pleading. ... An appeal is the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below. It seems absurd to denominate this paramount right part of the praotioe of the Inferior tribunal.

Clearly neither the decision, nor the obaerva. tions therein, have any bearing whatever on the question which falls for decision in this case. Entry 15 of List in gives ample power to the Central Legislature to pass legislation with respect to the jurisdiction and powers of Courts, if the provision relating to appeals falls within the words in Entry 2, 'criminal procedure.'

8. Even assuming that the subject-matter of Act xxvi [26] of 1943 does not fall within the words 'criminal procedure' in Entry 2 of the Concurrent List, I am clearly of opinion that it will fall within the words, 'all matters included in the Criminal Procedure Code at the date of the passing of this Aot', in the same entry. The learned Advocate General contended, it would not fall into- that category, because the word 'matters' should be construed as meaning 'provisions' and also because a right of appeal from a sentence or order of a Judge of the High Court sitting in Criminal Sessions to the High Court in the exercise of its appellate jurisdiction is not a matter which specifically finds a place in the Criminal Procedure Code. I do not think there is any warrant for such a construction. The word 'matters' is much more eomprehen. sive and is of wider import than the word 'pro. visions,' The learned Advocate.General was forced to admit that a logical application of the construction for which he contended would lead to the anamalous result that the provisions of 8.411A inserted by Act. XXVI [26] of 1943 would be valid if they were inserted by way of amend, ment to 9. 449, Criminal F, C, but as a separata section it would be invalid. Obviously, the Criminal Procedure Code deals with matters

which cannot be described as matters of procedure. Such are, for example, matters contained in chap, x, Public Nuisances, chap. XII, Disputes as to Immoveable Property, chap. XIII, Preventive Action of the Police, chap, xxxvi, Of the Main-tenance of Wives and Children, and chapter XXXVII, Directions of the nature of Habeas -Corpus. These matters would certainly be cover. d by Entry 2, and would be matters in respect of which the Central Legislature would have power to make laws. Support can be found for this construction of the latter part of the entry in the recent judgment of the Pull Bench of this Court in Narayanaswami Naidu v. Inspector of Police Ori. M. P. No. 1072 etc. of 1948 : A.I.R. 1919 Mad. 807, which dealt with Section 491 of the Code. It was there pointed out that the word 'including' is used in that entry as a word of enlargement and not of restriction : vide Dilworth v. Newzealand Commissioner of Stamps 1899 A. C. 99 : 68 L. J. p. c l. Part vii of the Code comprises chapters 2XXI and XXXH which deal with appeals, refer, ences and revisions. Section 449 is a special provision relating to an appeal from a Judge of the High Court sitting in Sessions to a Division .Bench of the High Court in certain cases. It is, therefore, reasonable to presume that the matter of providing appeals in criminal cases generally is a matter included in the Criminal Procedure Code.

9. Considerable reliance was placed by the learned Advocate General on certain observations of Narasinga Eau J. in Stewart v. Bro-jendra Kishore : AIR1939 Cal628 . In that case, the impugned provi-flion was B. 10-o inserted by the Assam Court of Wards (Amendment) Act, 19S7 which was passed by the Assam Legislature after 1st April 1937. Under that enactment, civil Courts were preclud-ed from executing any decree or order against the person or property of a ward of the Court of Wards, within certain periods prescribed. One of the arguments in support of the contention that it was invalid was that it fell within Entry 4 of the Concurrent List, which ran thus: 'Civil Procedure, including the law of Limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act' and that there was a repugnancy within the meaning of Section 107, Government of India Act. That argument was not accepted, because the Subjeekmatter of Section 100 was not strictly civil procedure, and it was also not a matter included in the Civil Procedure Code. In the course of the discussion relating to this contention, the learned Judge, Narasinga Bau J., made the

following observations:

Some difficulty is created by the last part of this item: 'all matters included in the Civil Procedure Code, eto It so happens that the Code contains certain provisions relating to the jurisdiction and powers of Courts, e.g., see Part I of the Code. Sections 9 to 25 dealing with 'jurisdiction and res judicata', Section 42 dealing with the powers of Courts in executing transferred decrees, Section 75 dealing with the power of Courts to issue commissions, and so on, But merely because of this, it does not follow that 'Civil Procedure' in the Concurrent Legislative List includes everything relating to the jurisdiction and powers of Courts. So to hold would ho completely to wipe out the second entry in the Provincial Legislative List: 'jurisdiction and powers of all Courts except the Federal Court with respect to any of the matters in this list'. It is true that where the subject might fall either in the Concurrent Legislative List or in the Provincial Legislative List, Section 100 makes the former the dominant list; bat this principle cannot apply where the result would be to rob the Provincial entry of all its content.' After citing the case of In re Marriage Reference 1912 A. O. 880 : 81 h. J. P. O. 337, the learned Judge prooeeded to say:Civil Procedure' in the Concurrent Legislative List must be held to exclude matters relating to jurisdiction and powers of Courts, since special provision is made for these matters elsewhere in the lists. The provisions of the Civil Procedure Code itself, whether they are 'Civil Procedure' in this limited sense or not, are of course specifically included in the fourth entry of the Concurrent Legislative List. But we consider that there Is no warrant for including in that entry any provisions which are not in the Code and which do not ap pertainto 'Civil Procedure' in the limited sense explain ed above.

The observation of the learned Judge that Civil Procedure in the Concurrent Legislative List must be held to exclude matters relating to the jurisdiction and powers of Courts, besides being obiter, certainly cannot be supported, if by that is meant that in no case can legislation with res-pect to jurisdiction and powers of Courts fall within the Concurrent List. That would be equally to rob Entry IS of the Concurrent List of its content. Each of the Lists I to III, contains an entry, 'jurisdiction and powers of Courts'. Vide entry 53 of List I, entry 2 of List II and entry 16 of List Hi, and it Should' not be overlooked that each of these entries has

reference to, and is with respect to, any of the matters in the corresponding list. If the subject-matter falls within either List I or List III, then certainly the Central Legislature has power to make laws affecting the jurisdiction and powers of Courts with respect to that matter. I cannot agree that the decision in Stewart v. Rajendra Kishore : AIR1939 Cal628 , is an authority in favour of the contention of the learned Advocate-General. The observations of Govinda Menon J., in Narayanaswami Naidu v. Inspector of Police cri. M. P. No. 1072 etc, of 1918 : A. I. R. 1949 Mad. 307, do not carry the matter any further, because the learn, ed Judge only applied that decision to the faots of the case before him.

10. The learned Advocate General, to further strengthen his contention that the subject-matter of Act xxvi [26] of 1943 would not fall within Entry 2 of List III, argued that it fell within Entries 1 and 2 of List n. Clearly Entry 2 is not of much help, and certainly is not conclusive, because the jurisdiction and powers of all Courts except the Federal Court covered by that entry, should be 'with respect to any of the matters' in that list. It is only when a subject falls within any of the other entries in that list that the Provincial Legislature is empowered to make laws affecting the jurisdiction and powers of all Courts except the Federal Court with respect to such a matter. So, we are thrown back on Entry 1, That entry comprises several subjects, and so far as it is relevant, foe the purpose of the present discussion, it runs thus: .the administration of justice; Constitution and organisation of all Courts, except the Federal Court, and fees taken therein.

The learned Advocate-General tried to maintain that the provision for appeal contained in Section 4HA is a matter which falls within either, if not be th, of these two categories, namely, (l) Administration of justice, and (2) constitution and organisation of all Courts except the Federal Court.

11. 'Administration of justice' is no doubt capable of being understood in a very wide sense, and in that sense, may comprise even the establishment of Courts, providing for the institution, and trial of suits, and provisions regarding appeals and revisions. It can take in all civil and criminal proceedings, including execution in civil matters and punishment in criminal matters. In my opinion, the phrase should not be understood in that wide sense in the entry.

12. Nor would every case of conferment of a right of appeal from an inferior Court to a superior Court amount to the constitution or organisation of Courts. But the learned Advocate-General tried to maintain that by Section 411A a new Court was being constituted, and therefore, it was only the Provincial Legislature which had the power to pass a law providing for such constitution, as that subject has specially been assigned to it by entry I in List II. He referred us to the Act of Parliament contained in 7 Edward vil, C. 28, by which a Court of Criminal Appeal was established in England, consisting of some of the Judges of the Court of King's Bench. That Act is not relevant here, because it cannot be said that the High Court as such did not have appellate Criminal jurisdiction before Act xxvi [26] of 1943. Clause 27 of the Letters Patent constitutes the High Court as a Court of Criminal Appeal, and Clause 26 gives the High Court appellate jurisdiction even in respect of sentences and orders passed or made in a criminal trial before the Court of original criminal jurisdiction which may be constituted by one or more Judges of the High Court. In my opinion, the power and jurisdiction conferred by Clause 26 is really in the nature of appellate jurisdiction and power. See Chappan v. Moidin Kuiti 22 Mad. 68 : 8 M. L. J. 231. It has already been mentioned that under 8. 449 of the Code, the High Court was already a Court exercising appellate criminal jurisdiction in certain cases. The fact that further jurisdiction wa superadded to the jurisdiction already possessed by the High Court does not amount to the con. stitution of a new Court. I also consider that it would be an undue straining of the language to construe 'organisation' as comprising, providing a right of appeal.

13. On this point, considerable assistance can be derived from decisions of the Judicial Committee dealing with the interpretation of similar: entries in the Canadian Constitution, The distribution of legislative powers between the Dominon. Legislature and the Provincial Legislature is to be found in Sections 91 and 92, British North America Act. It is sufficient to refer to the following provisions:

Section 91: ...it 1b hereby declared that(notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that it to say:

27. The Criminal law, except the constitution of Courts of Criminal jurisdiction, but including the Procedure in Criminal matters.Section 92; 'In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:

14. The administration of justice in the province including the constitution, maintenance, and organisation of Provincial Courts, be to of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.Section 101: 'The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organisation of a general Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada.

In Nadany The King, 1926 A. C. 482 : 95 L. J. P. c. 114, it was held that Section 1026 of the Criminal Code of Canada, if and so far as it is intended to prevent the King in Council from giving effective leave to appeal against an order of a Canadian Court in a criminal case, was invalid, on two grounds namely, (l) that it was repugnant to the Privy Council Acts of 1833 and 1844 and was, therefore, void under the Colonial Laws Validity Act, 1865 and (a) that it could only be effective if construed as having an extra- territorial operation, whereas according to the law as it was in 1926, a Dominion Statute could not have extra-territorial operation. We are not concerned in this case with either of these grounds, and be , much time need not be spent on this case. But at page 490, there are the following observations which suggest that but for the two grounds of invalidity abovementioned, it would have been a valid provision:

The Attorney General, who argued the case for the Grown, did not contest the view that, having regard to the provisions of Section 1025, it was not open to the supreme Court of Alberta to give leave to appeal in this ease presumably on the ground that the Dominion Parliament, having exclusive, legislative authority in respect of the procedure in criminal matters throughout Canada, had power to deprive the Canadian Courts of any jurisdiction to grant leave to appeal in those matters.

I think the implication is that the legislative authority in respect of criminal procedure would include the power to provide for and affect the right of appeal in these matters.

14. be to the limitations on account of which Section 10S6, Canadian Criminal Code was held to be invalid in Nadan v. The King 1926 A. C, 482 : 95 L. J. P. 0. 114, were abrogated by the Statute of Westminster. The extent of the legislative competence conferred on the Canadian Legislature in regard to appeals to the King in Council in Criminal matters had therefore to be ascertained from the provisions of the British North America Act, 1867, in the case of British Coal Corporation v. The King 1985 A. C. 600 : A.I.R. 1935 f. c. 1SS. It was there held that 8. 91 of the Aet, read with the rest of the Act, not by express words, but by necessary intendment, invested the Canadian Dominion Legislature with power to regulate or prohibit appeals to the King in Council in criminal matters. In discussing the effect of the Statute of Westminster, their Lordships point out that in truth Canada was in enjoyment of the full scope of self-government, and its Legislature had been invested with all necessary powers for that purpose by the Act, and what the Statute did was to remove the few fetters already mentioned. Their Lordships then observed:

Among the powers which go to constitute self-government there are necessarily included powers to constitute the law Courts and to regulate their procedure and to appoint their Judges; save for the provisions of the Act these powers in regard to the then newly constituted Dominion would have all belonged to the King as the fountain of justice; but by the Act these powers are vested in the Dominion Legislature, and thus potato the prerogative is merged In the statutory powers. A most essential part of the administration of justice consists of the system of appeals. It Is not doubted that with the single exoeption of what Is called the prerogative appeal, that is, the appeal by special leave given in the Privy Council in London, matters of appeal from Canadian Courts are within the legislative control of Canada, that is of the Dominion or the Provinces as the caae may be.

The learned Advocate General relied on the sen-tence in which it is said that a part of the administration of justice consists of the system of appeals. But surely it

is evident that their Lord. ships were there not discussing the scope of the entry 14, 'administration of justice' in 8, 92, but they were using that phrase in a general and popular sense, from the fact that they expressly say that matters of appeal are within the legislative control either of the Dominion or of the Provinces, as the case may be. Their Lordships repelled the argument that the class of appeal with which that case was concerned, was a matter external to Canada, because the Privy Council sits in London, in the following manner:

As already explained, this latter proposition is true only in form, not in substance. But even so the reception of the hearing of the appeal in London is only one step in a composite procedure which starts from the Canadian Court and which concludes and reaches its consummation in the Canadian Court.

Their Lordships, in conclusion, saw no valid reason since the Statute of Westminster why the power to regulate or prohibit appeals to the King in Council should not be held to be vested in the Dominion Parliament by the Act with the consequence that it was validly exercised by the impugned section of the Act to amend the Criminal Code. Their Lordships, however, pointed out that it was neither necessary nor desirable to touch on the position as regards civil cases. In my opinion, this decision of the Privy Council is opposed to the contention of the learned Advocate-General based on the part of Entry I ' administration of justice.'

15. Though Attorney General for Ontario v. Attorney General, Canada 1947 A. C,127 : A. 1. R. 1947 p. c. 206 was decided on a construction of a. 101 of the British North America Act, under which the Dominion Parliament had power to establish a general Court of Appeal for Canada, there is ore passage at page 152 which lends some support to the contention on behalf of the accused that the words 'administration of justice' would not comprise provisions in regard to appeals. It is as follows:

In coming to this conclusion their Lordships do not think it useful to embark on a nice discrimination between the legislative powers contained in Sections 91 and 92 respectively of the Act. Nor, as it appears to them, is it necessary to determine whether the words of head 14 of Section 92, 'The administration of justica in the province1 would if they were disembarrassed of any contest be apt to embrace

legislation in regard to appeals to His Majesty in Council. There appear to be cogent reasons for thinking that they would not. But their Lordships do not make this the ground of their decision, for it is elsewhere, it is in Section 101 of the Act that the solution lies.

The following passage from Clements's Canadian Constitution, Edn. 3, at p. 539, supports the same conclusion, namely, that appeals form part of procedure:

The assignment to the Federal Parliament of exclusive authority over 'criminal law...inducting the procedure in criminal matters' has been held to preclude provincial legislatures from giving a right of appeal in particular instances; so that the creation of an appellate tribunal with a general Criminal jurisdiction Is futile unless the Federal Parliament confers the right of appeal in the particular instance. As a, matter of fact the Criminal Code covers negatively as well as affirmatively almost entirely the whole field of criminal appeals; and so far as such provisions extend they are of paramount authority.

If, for any reason, it should be held that there is a certain amount of overlapping, and such overlapping is be und to occur (vide Prafulla Kumar Mukherjee v. Bank of Commerce Ltd,,Khulna 1947 M. W. N, 846 : A.I.R. 1947 P. O. 60, then under 8.100 (2), the Concurrent List would prevail, in so far as a particular subject can be said to fall within entries be to in List II and List III.

16. Even assuming that the subject-matter of Act XXVI [26] of 1943 falls entirely within any of the entries in the Provincial List Mr. Jayarama Aiyar contended that it is nevertheless valid, because of the special provision contained in Section 103, Government of India Act. It runa thus:

If it appears to the Legislatures of two or more Provinces to be desirable that any of the mattera enumerated in the Provincial Legislative List should be regulated in those Provinces by Act of the Federal Legislature, and if resolutions to that effect are passed by all the Chambers of those Provincial Legislatures, it shall be lawful for the Federal Legislature to pass an Act for regulating that matter accordingly, but any act so passed may, as respects any Province to which it applies, be amended or repealed by an Act of the Legislature of that Province.

From the statement of objects and reasons published in the Gazette of India, parts IV and v relating to Bill No. I of 1943, which subsequently became Act xxvi [26] of 1943, it appears that all Provincial Governments were unanimously in favour of amending the law as provided in that bill. It is useful to extract the statement in full:

Statement of Objects and Reasons,

At the instance of the Bombay High Court the Bombay Government proposed to the Central Government in May 1941 that legislation should be undertaken to provide for a restricted right of appeal in criminal cases against the deoisions of a High Court exercising its original jurisdiction, on the lines contained in the Criminal Appeal Act, 1907 (7 Edw. 7. C. 23).

The Letters Patent of the various High Courts prohibit appeals in such cases, but provide a restricted power of neview, corresponding to that embodied in Section 434, Criminal P. 0., 1898. The Code of Criminal Procedure provides by Section 449, enaoted in 1923 to implement ft recommendation in the Eeport of the Kaoial Distinctions Confmittee, for appeals from decisions in cases tried before a High Court by a Jury under the special provisions of Chap. 38 but contains no provision for appeals in similar trials not held under that Chapter.

This absence of any general provision for appeals from the deoisions of a High Court exercising original Criminal jurisdiction is perhaps attributable to the state of English law on the subject when the Letters Patent were issued long before the passing of the Criminal Appeal Act, 1907. Provincial Governments and High Courts when consulted upon the Bombay Government's proposal, were unanimously in favour of amending the law in the direction indicated:The bill is designed to give effect to the conclusions which have emerged from a oolleotion of opinions expressed by the various authorities oonsulted.'

Mr. Jayarama Aiyar contends that as all the Provinces thought it desirable that the proposed legislation should be undertaken by the Central Legislature, it was lawful for the latter to pass the Act in question.

17. The learned Advocate-General sought to meet this contention in two ways: First, he said that the condition laid down in the section was not satisfied, because there was no resolution passed by the Chambers of the Provincial Legislature, as those legislatures were not in existence. At the time of the passing of the impugned Act in most of the Provinces, the Governor had issued proclamations under Section 93, Constitution Act assuming to himself all the powers vested in the Legislatures. So far as Madras is concerned, the proclamation clearly stated that the Governor had assumed to himself all powers vested by or under the Act in the Provincial Legislature and all powers rested in either Chamber of that Legislature. I do not gee why in these circumstances, it cannot be said that the resolution of the Governor should not be the resolution such as is referred to in Section 108. The Governor had assumed the powers of be to the Chambers of the Legislature, and that power would include a power exercisable under Section 103 of the Act, Another way in which the Advocate-General tried to meet the contention was by urging that the impugned Act did not purport to be passed by the Central Legislature in pursuance of action under Section 103. I do not think that if it appears to us that the condition of Section 103 is satisfied in fact, an Act passed by the Central Legislature, in the circumstances, should be held to be invalid, merely because it did not appear that the Central Legislature was enacting the lav in exercise of the power conferred under Section 108. On the whole, I think there is considerable force in the contention of Mr. Jayarama Aiyar, based on Section 103, Government of India Act.

18. Mr. Jayarama Aiyar also addressed to us an argument based on a presumed policy which oould be gathered from the distribution of powers, namely, that a certain uniformity of law was contemplated in all the Provinces in matters of general importance, like Criminal law and Procedure, including rights of appeal, evidence, etc. A perusal of the subjects contained in the Concurrent List does lend some support to this argument, bat I do not think it necessary to rest our conclusions on any presumption of a general policy underlying the distribution of legislative powers between the Centre and the Provinces.

19. In my opinion, Act xxvi [26] of 1943 is a valid enactment of the Central Legislature, and the appeals are therefore maintainable.

20. It was a matter for surprise that the objection to the maintainability of the appeal based on an attack on the validity of Act XXVI [26] of 1913 should have been taken on behalf of the Government. Section 4HA had been inserted by that Act and has remained in force for nearly five years, without any objection being taken to its validity. Several appeals including appeals by the Madras Government have been preferred and disposed of on the footing that the new section had been validly inserted in the Code, There was no apparent reason why after the lapse of such a long period the Provincial Government should have suddenly raised this objection. ApArticle however, from the lapse of time, there is one circumstance which calls for particular comment. Before the passing of the Act, the Provincial Government was consulted, and it was also at the desire and with the consent of this Provincial Government among other Governments that the impugned legislation was undertaken by the Central Legislature. Having praotically invited the Central Legislature to pass the Act in question, it was not proper on their part to have now raised this objection. Presumably, the Provincial Government was aware of what had taken place before the pas. sing of the Act. But the learned - Advocate. General was unable to explain why in spite of that, the Government now insisted on taking this objection to the maintainability of the appeals. He did not say that in the opinion of the Pro. vincial Government such a right of appeal as has been conferred by Section 411A should not have been conferred. If that were not so, I fail to see why this objection was taken.

21. The appeals will be posted in due course before the Division Bench dealing with Criminal Appeals.

Horwill, J.

22. I agree.

Rajagopalan, J.

23. I agree.