

In Re: S.M. Nathaniel and ors.

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Appellant : In Re: S.M. Nathaniel and ors.

Judgement :

P.V. Rajamannar, C.J.

1. The appellants in the above appeals were accused 1 to 4 in Case 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 Appeals Nos. 169 and 182 of 1948 were found guilty of 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 preferred under Section 411-A of the Code of Criminal Procedure which had been added to the Code by Act XXVI of 1943, 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 of 1943 was invalid as being ultra vires of the Central Legislature, which had enacted it. As the learned Judges felt 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 its Criminal Sessions were as follows : Under Section 25 of the 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 so 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 had full power and authority to review the case, or such part of it as may be necessary, and finally determine such 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 Code of Criminal Procedure 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:

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 grants leave to appeal on the ground that the case would, if it had been tried outside a Presidency-town, have been triable under the provisions of this Chapter,

then, notwithstanding anything contained in Section 418 or Section 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 may 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 consists of more than one Judge, be heard by two judges of the High Court.

By Act XXVI of 1943 passed by the Indian Legislature, Section 41 1-A 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 criminal jurisdiction notwithstanding anything contained in the Letters Patent of any High Court, and without prejudice to the provisions of Section 449. Section 7 of that Act, inter alia, also declared that Clauses 25, 26 and 41 of the 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 V of the Government of India Act, 1935. Section 99 (1) 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 indicated in Section 100, which runs thus:

(1) Notwithstanding anything in the two next succeeding Sub-sections, the Federal Legislature has and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the 'Federal Legislative List').

(2) Notwithstanding anything in the next succeeding Sub-section, 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 III in the said schedule (hereinafter called 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 II 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 of 1943 is one of the matters enumerated in List I or in List II in the Seventh Schedule 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 Aiyar, 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 Provincial 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 (3) of the Act as 'a Governor's Province', that is to say, 'Province' would not include what are described as 'Chief Commissioner's Provinces' in Part IV 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-9.

4. It was common ground that the subject matter of Act XXVI of 1943 is not covered by any of the entries in List I, 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 II, the Provincial Legislative List, and that it does not fall within entries 2 and 15 of List III, the 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 of 1943 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 Salmond's Jurisprudence, 8th Edition, pp. 495-6. 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 actions--*jus quod ad actiones pertinet*--using the term action in a wide sense to include all legal proceedings, Civil or 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 describing substantive law as that which, defines the right and procedural law as that which determines 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 example, 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 itself.

6. The learned Advocate-General invited our attention to the well-known class of cases in which it has been held that a right of appeal is a substantial 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 Refining Co. v. Irving* (1905) A.C. 369.). 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 Reddiar v. Krishnaswami Reddiar* (1943) 2 M.L.J. 57 : (1943) 6 F.L.J. 47 at 51 (F.C.) Varadachariar, 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 edition, at page 497, is apposite in this connection:

Although the distinction between substantive law and procedure is sharply drawn in theory, there are many rules of procedure which, in their practical 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.

7. 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 definition of procedure, which would nevertheless be matters relating to substantial rights of parties, with respect to which retrospective option may not apply.

8. Mr. Jayarama Aiyar argued that the subject matter of 'appeal' has always been included in the Procedure Codes, Civil and Criminal, in the continuous course of legislation in India, and that such legislative practice can be utilised as a useful guide in the interpretation of the descriptive terminology adopted in the Constitution Act, and particularly in the Lists in Schedule VII. In *C.P. Motor Spirit Taxation Act, In re* (1939) M.L.J. (Supp.) 1 : (1939) 2 F.L.J.6 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 clearly requires, not to have conferred a legislative power intended to be interpreted in a sense not understood by those to whom the Act was to apply.

In the same case, Sulaiman, J., referred to the following observations in *E.R. Croft v. Sylvester Dumphy* (1933) A.C. 156.

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 topic 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 (H.C.) the learned Judge of the Bombay High Court applied the same rule. Kania, J., as he then was, after citing from *Croft v. Dunphy* (1933) A.C. 156 said:

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

There can be no doubt that the provisions regarding appeals have always found a place in Codes of Procedure. Part VII of the Code of Criminal Procedure, as it stood on the date of the passing of the 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' 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.

9. The learned Advocate-General relied strongly on the decision of the House of Lords in *The Attorney-General v. Herman James Sillem* (1864) 10 H.L.C. 704: 11 E.R. 1200. and certain observations therein. In that case, the validity of rules made by the Barons of the Court of Exchequer under Section 26 of the Queen's Remembrance's Act, conferring a right of appeal in motions on the Revenue side of the Exchequer 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 mode 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 in the abstract, but with reference to existing Courts, and that 'practice ' means 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 both combined, could create such a right, it being essentially one of the limitation and extension of jurisdiction. The judgment of the Lord Chancellor (Lord Westbury), 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 both be bound, and that can be only by the act of some higher power. It was not competent to either tribunal or both collectively to create such rights. A power to regulate the practice of a Court 'does not involve or imply any power to alter the extent or nature of its jurisdiction'. After

holding that the words, 'process, practice, and mode 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 curiae*, or regulation of proceedings within the Court itself, the question is whether the 34th, 35th and 36th sections 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 practice of the inferior tribunal.

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

10. Even assuming that the subject matter of Act XXVI 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 Code of Criminal Procedure at the date of the passing of this Act,

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 Code of Criminal Procedure. I do not think there is any warrant for such a construction. The word 'matters' is much more comprehensive and is of wider import than the word 'provisions.' The learned Advocate-General was forced to admit that a logical application of the construction for which he contended would lead to the anomalous result that the provisions of Section 411-A inserted by Act XXVI of

1943 would be valid if they were inserted by way of amendment to Section 449 of the Criminal Procedure Code, but as a separate section it would be invalid. Obviously, the Code of Criminal Procedure deals with matters which cannot be described as matters of procedure. Such are, for example, matters contained in Chapter X, Public Nuisances; Chapter XII, Disputes as to Immoveable Property; Chapter XIII,, Preventive Action of the Police; Chapter XXXVI, Of the Maintenance of Wives, and Children and Chapter XXXVII, Directions of the Nature of Habeas Corpus. These matters would certainly be covered 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 Full Bench of this Court in Cr. M.P. No. 1072, etc., of 1948 (1940) 1 M.L.J. 1 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. Commissioner of Stamps) (1899) A.C. 99 , 106. Part VII of the Code comprises Chapter XXXI and XXXII which deal with appeals, references, 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 Code of Criminal Procedure.

11. Considerable reliance was placed by the learned Advocate-General on certain observations of Narasinga Rau, J., in *Stewart v. Brojendra Kishore* : AIR1939 Cal628 . In that case, the impugned provision was Section 10-C inserted by the Assam Court of Wards (Amendment) Act 1937, which was passed by the Assam Legislature after 1st April, 1937. Under that enactment, Civil Courts were precluded 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 of the Government of India Act. That argument was not accepted, because the subject matter of Section 10-C was not strictly Civil Procedure, and it was also not a matter included in the Code of Civil Procedure. In the course of the discussion relating to this contention, the learned Judge, Narasinga Rao, J., made the following observations:

Some difficulty is created by the last part of this item : ' all matters included in the Code of Civil Procedure, etc.' 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 be 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; but this principle cannot apply where the result would be to rob the Provincial entry of all its content.

After citing the case of Marriage Reference In re (1912) A.C. 880 the learned Judge proceeded 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 appertain to ' Civil Procedure ' in the limited sense explained 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 respect to jurisdiction and powers of Courts. fall within the Concurrent List. That would be equally to rob entry 15 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 15 of List III, 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. Brojendra Kishore* : AIR1939 Cal628 is an authority in favour of the contention of the learned Advocate-General. The observations of Govinda Menon, J., in *Crl. M.P. No. : (1949)1MLJ1* do not carry the matter any further, because the learned Judge only applied that decision to the facts of the case before him.

12. The learned Advocate-General, to further strengthen his contention that the subject matter of Act XXVI of 1943, would not fall within entry 2 of List III, argued that it fell within entries 1 and 2 of List II. 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 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, for 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 411-A is a matter which falls within either, if not both, of these two categories, namely (1) administration of justice, and (2) constitution and organisation of all Courts except the Federal Court.

13. ' 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.

14. 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 411-A 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 1 in List II. He refereed us to the Act of Parliament contained in 7 Edward VII, c. 23, 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 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 Courts 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 Kutti : (1898)8MLJ231). It has already been mentioned that under Section 449 of the Code the High Court was already a Court exercising appellate criminal jurisdiction in certain cases. The fact that further jurisdiction was superadded to the jurisdiction already possessed by the High Court does not amount to the constitution 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.

15. 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 Dominion Legislature and the Provincial Legislatures is to be found in Sections 91

and 92 of the British North America Act. It is sufficient to refer to the following provisions:

Section 91: It is 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 is 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 organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in these Courts.

Section 101:

The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for constitution, maintenance, and organization 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 *Nadan v. King* (1926) A.C. 482 it was held that Section 1025 of the Criminal Code of Canada, in 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, (1) that it was repugnant to the Privy Council Acts, of 1833 and 1884 and was therefore void under the Colonial Laws Validity Act, 1865, and (2) 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 so, 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 Crown, 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 case--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.

16. Both the limitations on account of which Section 1025 of the Canadian Criminal Code was held to be invalid in *Nadan v. The King* (1926) A.C. 482 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*. (1935) A.C. 500. It was there held that Section 91 of the Act, 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 pro tanto 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 exception 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 case may be.

The learned Advocate-General relied on the sentence in which it is said that a part of the administration of justice consists of the system of appeals. But surely it is evident their Lordships were there not discussing the scope of the entry 14, 'administration of justice' in Section 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 and 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 1, 'administration of justice.'

17. Though *Attorney-General for Ontario v. Attorney-General of Canada* (1947) A.C. 127. was decided on a construction of Section 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 one 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 justice in the province' would if they were disembarrassed of any context, 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.

18. The following passage from Clements's Canadian Constitution, Third Edition, at page 539, supports the same conclusion, namely, that appeals form part of procedure:

The assignment to the Federal Parliament of exclusive authority over 'criminal law. . . . including 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.

19. If, for any reason, it should be held that there is a certain amount of overlapping, and such overlapping is bound to occur (Vide P. K. Mukherjee v. Bank of Commerce Ltd., Khulna (1947) 2 M.L.J. 6 : 1947 L.R. 74 IndAp 23: (1947) F.L.J. 34, then, under Section 100(2) the Concurrent List would prevail, in so far as a particular subject can be said to fall within entries both in List II and List III.

20. Even assuming that the subject-matter of Act XXVI of 1943 falls entirely within any of the entries in the Provincial List, Mr. Jayarama Ayyar contended that it is

nevertheless valid, because of the special provision contained in Section 103 of the Government of India Act. It runs thus:

If it appears to the Legislatures of two or more Provinces to be desirable that any of the matters 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 regards any Province to which it applies, be amended or repealed by an Act of the Legislature of that Province.

From the statements of objects and reasons published in the Gazette of India, Parts IV and V relating to Bill No. 1 of 1943, which subsequently became Act XXVI of 1943⁵ 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 decisions of a High Court exercising its original jurisdiction, on the lines contained in the Criminal Appeal Act, 1907 (7 Edw. VII, c. 23).

The Letters Patent of the various High Courts prohibit appeals in such cases, but provide a restricted power of review, corresponding to that embodied in Section 434 of the Code of Criminal Procedure, 1898. The Code of Criminal Procedure provides by Section 449 enacted in 1923 to implement a recommendation in the Report of the Racial Distinctions Committee, for appeals from decisions in cases tried before a High Court by a Jury under the special provisions of Chapter XXXIII but contains no provision for appeals in similar trials not held under that Chapter.

This absence of any general provision for appeals from the decisions 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 collection of opinions expressed by the various authorities consulted.

Mr. Jayarama Ayyar 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.

21. 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 these 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 of the 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 vested in either Chamber of that Legislature. I do not; see 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 103. The Governor had assumed the powers of both 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 law in exercise of the power conferred under Section 103. On the whole, I think there is considerable force in the contention of Mr. Jayarama Ayyar, based on Section 103 of the Government of India Act.

22. Mr. Jayarama Ayyar also addressed to us an argument based on a presumed policy which could 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, but 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.

23. In my opinion, Act XXVI of 1943 is a valid enactment of the Central Legislature and the appeals are therefore maintainable.

24. 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 of 1943 should have been taken on behalf of the Government. Section 411-A 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. Apart, 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 practically 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 passing 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 Provincial Government such a right of appeal as has been conferred by Section 411-A should not have been conferred. If that were not so, I fail to see why this objection was taken.

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

Horwill, J.

26. I agree.

Rajagoplan, J.

27. I agree.

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