MODDER v. ISMAIL LEBBE

1905.
January 27.

P. C., Colombo, 89,283

Release of accused on bail—Bonds by accused and surety—Criminal Procedure Code, s. 341—Forfeiture of bond on default—Notice of forfeiture.

Where an accused was released on his entering, along with a surety, into recognizances in accordance with section 341 of the Criminal Procedure Code, but couched in a special form, and where they failed to comply with the terms of the bond, though summonses were issued to them to appear, and where their bonds were thereupon declared forfeited,—

Held, that, according to the practice of the Courts, matters such as these were dealt with in the course of the proceedings to which they were incidental, and that, though the bond of the principal may be forfeited without noticing him to show cause against the forfeiture, it was absolutely necessary to issue such notice where the surety was concerned.

THE accused was charged under section 394 of the Penal Code with having received stolen property knowing it to have been stolen. On conviction he appealed and was released on bail on his entering, along with the appellant as surety, into a recognizance in Rs. 500 to " attend at the Police Court immediately after the proceedings in the case should have been returned to the Police Court, and there surrender himself into the custody of the Police Court, and abide the sentence which should have been pronounced against him, and not depart without leave according to law." The surety bound himself for the appearance of the principal.

On the return of the proceedings from the Supreme Court the principal and surety, in spite of summonses, made default, whereupon their bonds were declared forfeited.

The surety appealed.

The case came up for argument on 27th January, 1905.

H. A. Jayawardene, for appellant.—The condition that the accused should appear immediately after the proceedings should have been returned to the Police Court is *ultra vires*, as such a condition is not sanctioned by section 341 of the Criminal Procedure Code. That section only requires that the appellant should abide the judgment of the Supreme Court; it is immaterial when he does so.

Further, there was no notice to the surety requiring him to show cause why the bond should not be forfeited, as is required by the judgment in *D. C., Negombo, 2,805*. Even if such a notice did issue, it was not served on the appellant either personally or by substituted service.

Rámanáthan, *S.-G.*, for respondent.—The words " abide the judgment " necessarily imply that the stipulation is to surrender and (previous to surrender) to attend in Court upon the determination of proceedings in the Supreme Court. These two stipulations are necessarily implied in the stipulation to " abide the judgment. " Hence the stipulation to appear " immediately after the proceedings should have been returned " is not *ultra vires* of section 341 of the Criminal Procedure Code. In view of this stipulation no notice was necessary.

The facts of the case in *D. C.*, *Negombo*, *2,805* are distinguishable from those of the present, inasmuch as there was no special stipulation in that case as there is here.

Cur. adv. vult.

27th January, 1905. MONCREIFF, J.—

The Police Magistrate of Colombo found one Ismail Lebbe guilty of an offence punishable under section 394 of the Penal Code. Ismail Lebbe appealed to the Supreme Court, and was released on bail on entering into a bond to attend at the Police Court immediately after the proceedings in the case should have been returned to the Police Court, and there surrender himself into the custody of the Police Court and abide the sentence which should have been pronounced against him, and not depart without leave according to law.

One Kader Kanni Pichche declared himself surety for Ismail Lebbe that the latter should attend the Police Court immediately after the proceedings in the case should have been returned to the Police Court from the Supreme Court on appeal, and there surrender himself into the custody of the Police Court and abide the sentence which should have been pronounced against him, and not depart without leave according to law. And he bound himself to forfeit Rs. 500 in case of default.

Mr. Jayawardene says that this surety's bond was taken *ultra vires*, as the Magistrate had no power to order the surety under section 341 to be bound over in those terms. I think, however, that as the principal is bound by his bond to do certain things on the judgment of the Supreme Court being affirmed, the surety from the very meaning of the term naturally binds himself to see that the principal adheres to the terms of his bond.

The Supreme Court affirmed the conviction of Ismail Lebbe, but although notice was issued both to him and to his surety, neither of them was discovered until after a considerable time. In fact the notices could not be served upon them. After the Supreme Court judgment, however, the principal, Ismail Lebbe, petitioned His Excellency the Governor on the subject.

1905. *January 27.* MONCREIFF, J.

The Magistrate, however, proceeded, upon finding that the surety could not be discovered either by notice or warrant, to forfeit the surety's bond, and to order writs to issue for the recovery of the amounts due.

On the 3rd December the accused surrendered, and on the tenth of the same month the surety appeared and asked that the attachment issued against him might be recalled on the ground that he had no notice. On a recent occasion in case No. 134 *D. C., Negombo, 2,805,* the Chief Justice dealt with this subject, and I agreed with his judgment. He ascertained that it had been the practice in the District Courts, upon failure of sureties and principals to adhere to the terms of their bond, generally to deal with such matters in the course of the proceedings to which they were incidental; that it had been customary to forfeit the principal's bond without notice, but that it had not been customary to forfeit the surety's bond without giving him notice and an opportunity of showing cause against the forfeiture of his bond. Now, the surety in this case had no notice calling upon him to show cause why his bond should not be forfeited. The only notice issued to him, which however was not served on him, was what had been a printed form of " summons to a witness. " The notice recited that the judgment in the case in question had been affirmed by the Supreme Court, and the surety was summoned to testify what he knew concerning the matter of the complaint, and not to depart thence without leave of the Court. He was also warned that, if he did not appear without just excuse, a warrant would be issued to compel his attendance. It is clear that this surety had no notice of impending forfeiture given to him, and no opportunity of showing cause against the forfeiture of the bond. I think that the appeal should be allowed and the order of the Magistrate set aside.