1946 *Present :* **Rose J.**

JINASEKERE, Petitioner, *and* THE ATTORNEY-GENERAL, Respondent.

APPLICATION FOR DISCHARGE OR FOR BAIL IN M. C., GAMPAHA, No. 23,673.

Bail—Discharge—Conviction for murder—Re-trial ordered by Court of Criminal Appeal—Application by prisoner for discharge or bail—Meaning of "committed for trial"—Courts Ordinance (Cap. 6), s. 31.

Where a prisoner, whose case was ordered by the Court of Criminal Appeal to be re-tried, made application under section 31 of the Courts Ordinance that he should be discharged under the second part of the section or alternatively be granted bail under the first part—

Held, that the provisions of section 31 of the Courts Ordinance are not applicable to a case in which the Court of Criminal Appeal orders a person to be re-tried.

APPLICATION for discharge or admission to bail of prisoner committed for trial before the Supreme Court. The applicant was originally committed for trial on July 28, 1944, for murder. He was subsequently tried and convicted. On June 11, 1945, the Court of Criminal Appeal quashed the conviction and ordered a re-trial. On March 20, 1946, the applicant moved the Commissioner of Assize, Colombo, as the presiding Judge of the second criminal sessions after the order of re-trial, to direct his discharge or admit him to bail. After argument on March 27, 1946, the learned Commissioner was of opinion that he had no jurisdiction to deal with the application, as the Court of Criminal Appeal had ordered the re-trial, that a discharge would in effect nullify the order for re-trial, and that the application should properly be made to the Court of Criminal Appeal. Thereupon the application was withdrawn and presented again to the Supreme Court as the right forum for relief.

Frederick W. Obeysekere, for the applicant.—The Supreme Court is the right forum as the Court of Criminal Appeal is no longer in seisin of the applicant or his case. A prisoner has a right, in the same case and on the same facts, in an application for liberty, to have the successive opinions of each Judge of the Supreme Court on the merits of the application. There is no *res judicata*. See *Eleko v. Government of Nigeria* [1]. The right to bail is clear under section 31 of the Courts Ordinance, as the applicant has not been brought to trial in the first criminal sessions after the date of his being sent to the Supreme Court for trial. See *de Mel v. The Attorney-General* [2]. So also the right to discharge, as he was not brought to trial in the second sessions, which in the present case is the third criminal sessions, which then satisfies the six months interval required by section 31 of the Courts Ordinance.

[ROSE J.—Have I power to discharge when I am not the presiding Judge of the requisite second criminal sessions ?]

Yes. The applicant resorted to the right Judge but was referred elsewhere. *The King v. Croos* [3] seems in other circumstances to have taken a negative view.

M. F. S. Pulle, Acting Solicitor-General (with him *J. G. T. Weeraratne, Crown Counsel*), for the Attorney-General.—Section 31 of the Courts Ordinance has no application to a case in which a re-trial has been ordered by the Court of Criminal Appeal. The expression " committed for trial before the Supreme Court " in that section means a committal by a Magistrate. An order of re-trial is not a committal for trial by the Court of Criminal Appeal to the Supreme Court. Whether a trial be one at Bar or by a jury it must be preceded by a commitment of the accused by a Magistrate. It is submitted that even at a trial at Bar for sedition the accused should be committed for trial by a Magistrate—*vide* section 440A (4). A valid commitment by a Magistrate is the basis of any trial, whether it is the first trial or a second one ordered by the

[1] *(1928) A. C. 459.* [2] *(1940) 47 N. L. R. 136.*
[3] *(1944) 47 N. L. R. 185.*

Court of Criminal Appeal. Even in a case in which a re-trial has been ordered it should be open to the accused to contest the validity of the indictment or the commitment.

Since the amendment to the Criminal Procedure Code in 1938, the interval of time that lapses between commitment and trial is longer. Prior to the amendment a copy of the indictment used to be served on the accused immediately after committal. At the present time, through no fault of the Attorney-General, many months elapse between commitment and service of indictment.

Every possible step was taken by the prosecution to bring the accused early to trial. Not an inconsiderable part of the delay was due to early dates suggested by the prosecution not suiting the convenience of counsel for the defence.

In view of the opinion of the Court of Criminal Appeal (46 N. L. R. 243) that a strong *prima facie* case of murder has been made out against the accused, the application for bail should be refused.

F. W. Obeyesekere, in reply.—Nothing in section 31 of the Courts Ordinance indicates that it is restricted to a committal by a Magistrate. In fact section 27 of the (English) Interpretation Act of 1889 defines "committal for trial" to mean "any person . . . . committed to prison with a view of being tried before a Judge or Jury whether . . . . committed by a Court, Judge, Coroner or other authority having power to commit a person to any prison with a view to his trial". Remedial statutes are liberally construed to cover the "mischief" (Broom's Legal Maxims, 1939 ed., p. 382), which in this case is a violation of Magna Carta, which is common law of the Empire, and whose 40th Article lays down "To no man . . . . shall we delay right or justice". Three sessions have passed with no trial. If the contention for a limited construction is accepted, a prisoner committed by the Court of Criminal Appeal can be detained for years without trial. The interpretation of statutes has always in modern times been highly favourable to the personal liberty of the subject—Broom's Legal Maxims, p. 383.

Cur. adv. vult.

April 11, 1946. ROSE J.—

This is an application under section 31 of the Courts Ordinance that the applicant should be discharged under the second part of the section or alternatively should be granted bail under the first part. It appears that the applicant was convicted of murder but on appeal the conviction was quashed and a re-trial ordered. The date of the judgment of the Court of Criminal Appeal was June 11, 1945. More than two Criminal Sessions of the Supreme Court have been terminated since that date. The question to be considered therefore is whether section 31 applies to a case in which the Court of Criminal Appeal orders a person to be re-tried.

Surprisingly, this point does not seem to be covered by authority. It seems to me, however, that the more reasonable interpretation is that

contended for by the Solicitor-General that the words " committed for trial " should be limited in their application to persons committed for trial by a Magistrate. It is to be noted that neither in the Courts Ordinance nor in the Interpretation Ordinance is there any definition of the words " committal " or " committed for trial ". No assistance therefore can be derived from the definition of " committed for trial " contained in section 27 of the (English) Interpretation Act of 1889.

That being so, I am of opinion that no application under section 31 can be entertained in this case. This section being inapplicable, there would seem in the present matter to be no good grounds for departing from the normal practice of refusing to grant bail to a person who is detained on a charge of murder.

For these reasons the application is refused.

Application refused.