
(1923) 10 CAL CK 0006

Calcutta High Court

Case No: None

Barendra Kumar Ghose

APPELLANT

Vs

Emperor

RESPONDENT

Date of Decision: Oct. 8, 1923

Acts Referred:

- Letters Patent Act, 1865 - Clause 41
- Penal Code, 1860 (IPC) - Section 34

Citation: 83 Ind. Cas. 580

Hon'ble Judges: N.R. Chatterjea, J; Asutosh Mookerjee, J

Bench: Division Bench

Judgement

1. This is an application for leave to appeal to His Majesty in Council under Clause 41 of the Letters Patent, which is in the following terms:

41. And We do further ordain that, from any judgment, order or sentence of the said High Court of Judicature at Fort William in Bengal, made in the exercise of Original Criminal Jurisdiction, or in any criminal case where any point or points of law have been re-served for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised Original Jurisdiction, it shall be lawful for the person aggrieved by such judgment, order, or sentence to appeal to Us, Our heirs or successors in Council; provided the said High Court shall declare that the case is a fit one for such appeal and under such conditions as the said High Court may establish or require, subject always to such rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

2. The petitioner Barendra Kumar Ghose was placed on his trial at the last Sessions, before Mr. Justice Page and a Special Jury, on charges under Sections 302 and 394. Indian Penal Code. The Jury returned a unanimous verdict of guilty on the charge of murder and Mr. justice Page thereupon sentenced the prisoner to death. A certificate was

then obtained on his behalf from the Advocate-General, under clause 26 of the Letters Patent, that in his judgment, whether an alleged direction and an alleged omission to direct the Jury did not in law amount to a misdirection should be further considered by the High Court. The question was accordingly argued before a Full Bench. On the 26th September, 1923, the Full Bench delivered judgment and ordered that the application made by the prisoner under clause 26 do stand dismissed. The present application was made on the 3rd October, 1923, for a certificate under clause 41 that the case is a fit one for appeal to His Majesty in Council. The matter has been exhaustively argued before us on behalf as well of the prisoner as of the Crown and our attention has been invited to the relevant authorities on the subject.

3. It is indisputable that as His Majesty the King is supreme over all persons and Courts within his Dominions, a right of appeal in all cases, civil and criminal, to the King in Council, exists, from the highest Court of each separate Colony, Province, State or Possession, whether it be a Court of error or not, except so far as the prerogative in this behalf has been expressly surrendered; *Gushing v. Dupuy* (1880) 5 App. Cas. 409 : 49 L.J.P.C. 63 : 42 L.T. 445, *In Re: Wi Matua's Will* (1908) A.C. 448 : 78 L.J.P.C. 17 : 24 T.L.R. 834. Criminal proceedings, however, are, in practice, reviewed, only if it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done. The Judicial Committee do not, as a rule, advise His Majesty to grant appeals in criminal cases, except where questions of great and general importance, likely to occur often, are raised, and where the due and orderly administration of the law is shown to be interrupted, or diverted into a new course, which might create a precedent for the future, and where there are no other means of preventing these consequences. Such appeals lie either by the right of grant, in pursuance of leave obtained by the appellant from the Court appealed from, or by reason of special leave granted by the Judicial Committee. The latter appeals arise, either where the Court below does not possess power to grant leave to appeal, or where leave to appeal has been refused by the Court below, or where the leave to appeal was granted on some special point and the appellant wishes to raise points not included in the leave to appeal: *Rex v. Louw* (1904) A.C. 412 : 73 L.J.P.C. 65 : 91 L.T. 210 : 20 T.L.R. 572, *Daily Telegraph Co. v. Mc Laughlin* (1904) A.C. 776 : 73 L.J.P.C. 95 : 91 L.T. 233 : 20 T.L.R. 674, *Victorian Railway Commissioners v. Brown* (1906) A.C. 381 : 75 L.J.P.C. 65 : 95 L.T. 73 : 22 T.L.R. 644 and *Alright v. Hydro-Electric Power Commission of Ontario* (1923) A.C. 167 : 92 L.J.P.C. 80 : 128 L.T. 513. But whether leave is granted by the Court appealed from or by the Judicial Committee, it is plain that the answer to the question, whether the case is a fit one for appeal, must depend on the same considerations; the grant of the leave to appeal is a step ancillary to the determination of the appeal, and the principles which regulate the ultimate decision of the appeal cannot obviously be ignored when an application for leave; is examined: *Ibrahim v. Reg.* (1914) A.C. 599 at p. 615 : 83 L.J.P.C. 185 : 111 L.T. 20 : 30 T.L.R. 383 : 24 Cox C.C. 174.

4. The judicial pronouncements on the subject fall broadly into two divisions, according as they were made in Indian cases or in Colonial cases. The decisions in Indian cases, again, may be conveniently considered in two groups, namely, first, those that had reference to sentences in original criminal trials governed by clause 41 of the Letters Patent or a provision of like import, and, secondly, those that arose out of appellate decisions not subject to the operation of clause 41 or a similar rule.

5. In the first group of Indian cases, the earliest decision which has been brought to our notice is that of *Pooneakhoty Moodeliar v. Reg.* (1835) 3 Knapp 348 : 12 E.R. 684. The appellant had been convicted at a Sessions held on the Crown Side of the Court of the Recorder of Bombay on a charge of uttering a forged receipt for money, with intent to defraud the East India Company. The prisoner obtained leave to appeal from the Court of the Recorder. The Judicial Committee considered the appeal on the merits, affirmed the conviction in respect of one offence, but reversed the judgment as erroneous in respect of another offence. Important questions of law including a question of jurisdiction were involved in the appeal. The next case in point of time is that of *Aga Kurboolie Mahomed v. Queen* 3 M.I.A. 164 : 4 Moo. P.C. 239 : 1 Sar P.C.J. 261 : 18 E.R. 163 : 13 E.R. 293. The appellants were tried on charges of assault and battery, in the Supreme Court at Calcutta before Sir John Peter Grant and a Jury, and were convicted. A Rule was granted to set aside the verdict but was discharged, Sir Edward Ryan, C.J., dissenting. The Supreme Court at the same time gave leave to appeal to Her Majesty in Council. The Judicial Committee heard the appeal on the merits and directed that the Rule for new trial be made absolute; and they also intimated their hope that the indictment would not be further prosecuted. It may be noted that when the Judicial Committee (Lord Brougham, Lord Campbell, Knight Bruce, V.C. and Dr. Lushington) heard the appeal, Sir Edward Ryan sat as Assessor. These two cases, as we shall presently see, stand in a class by themselves, and were not followed in the case of *Queen v. Eduljee Byramjee* 3 M.I.A. 468 : 5 Moo. P.C. 276 : 1 Sar.P.C.J. 305 : 18 E.R. 577 : 13 E.R. 496. There the petitioners applied for leave to appeal from a conviction for felony at a trial held in the Supreme Court of Bombay before Sir Henry Roper, C.J., and Sir Erskine Perry, J., and a Jury who returned a verdict of guilty. Dr. Lushington who delivered the judgment of the Judicial Committee ruled that there was no power reserved to the Crown by the Charter of the Supreme Court, 1823, which conferred on that Court and that Court alone full and absolute power and authority to allow or deny appeals in criminal causes. With this may be compared the decision of the Judicial Committee in *In the Matter of Abraham Ames* (1844) 3 Moo.P.C. 409 : 13 E.R. 166, where leave granted on an ex parte application to appeal from a criminal proceeding in Jersey, was recalled. The same view was reiterated in *Queen v. Alloo Paroo* 3 M.I.A. 488 : 5 Moo.P.C. 296 : 1 Sar.P.C.J. 310 : 24 Perry's O.C. 551 : 18 E.R. 586 : 13 E.R. 504. We next come to the case of *Nga Hoong v. Queen* 7 M.I.A. 72 : 4 W.R. 109 : Boul. 189 : 1 Suth. P.C.J. 283 : 1 Sar.P.C.J. 598 : 19 E.R. 237 (P.C), where an appeal was allowed from a judgment on a conviction by the Supreme Court at Calcutta in a case of murder. The prisoner was tried before Sir James Colville, C.J., and a Jury, who returned a verdict of guilty, A question of jurisdiction, which had been reserved, was

argued before the Full Court. The Chief Justice and Buller, J., held that the Court had jurisdiction, while Jackson, J., held that the Court had no jurisdiction. The question turned upon the construction of Section 56 of Stat. 9, Geo. IV, c. 74. The Judicial Committee held that the Court had no jurisdiction and annulled the conviction. In *In the Matter of Mac Crea* 20 I.A. 90 : (1893) A.C. 346 : 17 Cox C.C. 702 : 15 A. 310 : 6 Sar.P.C.J. 344 : 17 Ind. Jur. 430 : 7 Ind. Dec. 915 (P.C.), which was approved in *In the matter of Rajendro Nath Mukerji* 26 I.A. 242 : 22 A. 49 : 3 C.W.N. 736 : 1 Bom L.R. 708 : 7 Sar.P.C.J. 556 : 9 Ind. Dec. 1064 (P.C.) the prisoner was convicted of offences under sections 420 and 511, Indian Penal Code, and was sentenced to imprisonment. The High Court of Allahabad refused to certify u/s 32 of the Letters Patent of 1866 that the case was a fit one for appeal to His Majesty in Council. The Judicial Committee declined to grant special leave. Lord Halsbury observed that there were no doubt very special and exceptional circumstances in which leave to appeal was granted in criminal cases, but it would be contrary to the practice of the Board and very mischievous, if any countenance were given to the view that an appeal would be allowed in every case in which it could be established that there had been a misdirection by the Judge who tried the case. In *Bal Gangadhar Tilak v. Queen-Empress* 25 I.A. 1 : 22 B. 528 : 7 Sar. P.C.J. 270 : 11 Ind. Dec. 933 (P.C.), the Judicial Committee refused to grant leave to appeal. The question raised related to the true construction of Section 124A, Indian Penal Code which, it was urged, had been erroneously interpreted by Strachey, J., in his charge to the Jury. Lord Halsbury observed that taking a view of the whole of the summing up, there was nothing in that summing up which called upon their Lordships to indicate any dissent from it nor any necessity to correct what was therein contained looking at the summing up as a whole and looking at each part of what was said by the light of what else was said. In *Subrahmanya Iyer v. King-Emperor* 28 I.A. 257 : 25 M. 61 : 11 M.L.J. 233 : 3 Bom L.R. 540 : 5 C.W.N. 866 : 2 Weir 271 : 8 Sar.P.C.J. 160 (P.C), the appellant was tried in contravention of Section 234, Criminal Procedure Code, on an indictment in which he was charged with no less than 41 acts extending over a period of two years. The Judicial Committee annulled the conviction and sentence on the ground the trial was prohibited in the mode in which it was conducted. In *In Re: Bal Gangadhar Tilak* 2 Ind. Cas. 152 : 33 B. 221 : 10 Bom.L.R. 973: 4 M.L.T. 45 : 9 Cri.L.J. 226, the accused was tried before Davar, J., and a Jury on charges u/s 124 A, Indian Penal Code, and was convicted. Sir Basil Scott, C.J., and Batchelor, J., declined to grant leave and ruled that before a certificate could be granted the Court must be satisfied that there was reasonable ground for thinking that grave and substantial injustice might have been done by reason of some departure from the principles of natural justice. Reference was made to the decisions in *Dinizulu v. Zululand Attorney-General* (1889) 61 L.T. 740 : 16 Cox C.C. 735, *Ex parte Carew* (1897) A.C. 719 : 18 Cox C.C. 625 and *In Re: Dillet* (1887) 12 A.C. 459 : 56 L.T. 615 : 36 W.R. 81 : 16 Cox C.C. 241. To the same effect are the decisions in *Clifford v. Emperor* 22 Ind. Cas. 496 : 40 I.A. 241 : 41 C. 568 : 19 C.L.J. 107 : (1914) M.W.N. 11 : 16 Bom.L.R. 1 : 12 A.L.J. 75 : 15 M.L.T. 84 : 18 C.W.N. 374 : 15 Cri.L.J. 144 : 7 Bur.L.T. 37 : 83 L.J.P.C. 152 (P.C.) and *Channing Arnold v. Emperor* 23 Ind. Cas. 661 : 41 I.A. 149 : (1914) A.C. 644 : 83 L.J.P. 299 : 111 L.T. 324 : 30 T.L.R. 462 : 41 C. 1023 : 18

C.W.N. 785 : 26 M.L.J. 621 : 15 Cri.L.J. 309 : 1 L.W. 461 : 7 Bur.L.T. 167 : (1914) M.W.N. 506 : 16 M.L.T. 79 : 12 A.L.J. 1042 : 20 C.L.J. 161 : 16 Bom.L.R. 544 : 8 L.B.R. 16 (P.C.), where leave to appeal was refused. It is worthy of note that in the second case, there was a clear indication that even if the Judicial Committee could sit as a Court of criminal appeal, it was hardly doubtful that the appeal would fail. In the first case, Viscount Haldane pointed out that it would be contrary to their constitutional duty, if the Board were to assume the position and function of a Court of Criminal Appeal, a Court which could go into questions of evidence and procedure and could deal with the case on the same footing as an ordinary Court of Appeal. In the same way, in *Annie Besant v. Advocate-General, Madras* 52 Ind. Cas. 209 : 46 I.A. 176 : 37 M.L.J. 139 : 17 A.L.J. 925 : 23 C.W.N. 986 : 21 Bom.L.R. 867 : (1919) M.W.N. 555 : 10 L.W. 451 : 20 Cri.L.J. 593 : 26 M.L.T. 408 : 1 U.P.L.R. (P.C.) 74 : (1919) 35 T.L.R. 500 : 43 M. 146 : 35 T.L.R. 500 (P.C.), where important questions arose as to the scope and effect of the provisions of the Indian Press Act, 1910, the High Court of Madras refused to give a certificate. The Judicial Committee granted special leave to appeal; the decision of the High Court was however, ultimately affirmed on the merits and the appeal was dismissed.

6. In the second group of Indian cases, we have instances where, in the absence of a provision like that of clause 41 of the Letters Patent, application for special leave was made to the Judicial Committee. It will be recalled in this connection that as pointed out in *Reg. v. Reay* 7 B.H.C.R. 77 Cr, *Chintaman Singh v. Emperor* 21 Ind. Cas. 170 : 18 C.L.J. 119 : 14 Cri.L.J. 598, *Ataur Singh v. Emperor* : 21 Ind. Cas. 912 : 18 C.L.J. 121 : 14 Cri.L.J. 672 and *Phillip E. Billingham v. Emperor* 82 Ind. Cas. 763 : 38 C.L.J. 406 : (1924) AIR (C.) 338 : 25 Cri.L.J. 1371 where there is no provision like clause 41 applicable, no Indian Court can grant leave to appeal to His Majesty in Council, and this was apparently overlooked by Wilson J., in *Queen-Empress v. Nilmadhab Mitter* 15 C. 608n : 7 Ind. Dec. (N.S.) 988n. In such cases, the remedy is by an application for special leave to His Majesty in Council. The earliest instance is "afforded by the case of *Queen v. Joy Kissen Mookerjee*. The Judicial Committee came to the conclusion that justice had not been very well administered in the case and yet refused the application. Dr. Lushington observed that the consequences of granting an appeal in cases of this description were so exceedingly strong, they were so entirely destructive of the administration of all criminal jurisprudence, that the Board could not for a single moment doubt that they were of the greatest importance in guiding their Lordships to form a judgment. The application was thus refused, because, if it were granted, "not only would the course of justice be maimed, but in very many instances it would be entirely frustrated." This standpoint was emphasised by Sir Micheal Westropp, C.J., when he was invited to grant a certificate in the case of *Reg. v. Pestonji Dinsha* 10 B.H.C.R. 75 at p. 92. The decision in *In Re: Maharaja Madhava Singh* does not directly touch the question, because there the decision impeached was that of the Governor-General in Council which might be treated as a political act--an act of State--not a decision of a Court from which an appeal lay to His Majesty in Council. Similar observations apply to *Ex parte Mgonini* where the Judicial Committee declined to interfere with an act of the executive government of Natal, as later

on in *Tilonko v. Attorney-General of Natal*. The decisions of what were undoubtedly Criminal Courts were sought to be challenged before the Judicial Committee, by special leave, in *Painda Khan v. King-Emperor* Ind. Dec. the appeal was allowed on the ground that the Magistrate who had taken cognizance of the alleged offence and had issued a warrant against a subject of the Nizam, had acted without jurisdiction. In *Vaithi-natha Pillai v. Emperor* which was an appeal by special leave in a murder case, the appeal was allowed and the conviction was set aside. The Judicial Committee came to the conclusion that there was no evidence which could support a conviction for murder or abetment of murder. In *Sayyapureddi Chinnayya Dhora v. Emperor*, the sentence of transportation for fourteen years was held to be illegal, and the case was remitted to the High Court with instructions to pass a sentence according to law. In *Dot Singh v. Emperor* special leave was granted, but the appeal in each instance ultimately failed on the merits. On the other hand in *Painda Khan v. King-Emperor* the application for special leave to appeal was dismissed.

7. In the series of cases which came before the Judicial Committee from Colonial Courts, the earliest is the decision in *Falkland Islands Company v. Reg.* where Lord Kingsdown quoted with approval the observations of Dr. Lushington in *Queen v. Joykissen Mookerjee*. This set the tradition, as it were, and it came to be recognised that though it was the settled prerogative of the Crown to receive appeals in all Colonial cases : [In re *Natal Bishop*] the inconvenience of entertaining such appeals in cases of a strictly criminal character was so great, the obstruction that it would offer to the administration of justice in the Colonies was so obvious, that it was only on rare occasions, in exceptional circumstances, that applications of that description should be encouraged or entertained by the Judicial Committee. This doctrine will be found to permeate the stream of later decisions. Amongst these may be mentioned *Lavein v. Queen*. It is not necessary to set out here a detailed analysis of all the observations of their Lordships in the cases mentioned; their essence will be found concisely stated by Lord Watson in *In re, Dillet* which has been repeatedly followed:

The rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.

8. This principle was successfully invoked on behalf of the Crown in the cases of *Reg. v. Bertrand* where a Colonial Court had, in each instance, set aside a conviction and granted a new trial in excess of its jurisdiction. There was no occasion to apply the doctrine in *Lavein v. Queen* as the prisoner obtained a free pardon and was discharged from prison before his appeal could be heard; the Judicial Committee held that as the prisoner had obtained the substantial benefit of a free pardon they would not enter upon the merits of the case or pronounce an opinion upon the legal objections to the conviction. But the principle was successfully invoked- on behalf of the accused in the cases of *Falkland Islands Company v. Reg.*. A noteworthy instance of successful appeal

will be found in *Lanier v. Reg.* where the conviction was for embezzlement, and this may be taken along with *Vaithinatha Filial v. King-Emperor*. which was, as we have seen, a successful appeal against conviction for murder and sentence of death. In this connection, the following passage from the judgment of Lord Sumner in *Ibrahim v. Re-gam* may be usefully re-called:

Having regard to the particular position in which their Lordships stand to criminal proceedings, they do not propose to intimate what they think the rule of English Law ought to be, much as it is to be desired that the point should be settled by authority so far as a general rule can be laid down where circumstances must so greatly vary. That must be left to a Court which exercises, as their Lordships do not, the revising functions of a general Court of Criminal Appeal: *Clifford v. King-Emperor* Their Lordships' practice has been repeatedly defined. Leave to appeal is not granted except where some clear departure from the requirements of justice" exists: *Riel v. Reg.* ; nor unless by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done: *In Re: Dillet* . It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing-*Riel v. Reg.* . The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice: *In the matter of MacCrea* There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future: *Reg. v. Bertram*

9. The same principle was emphasised by Viscount Haldane in *Dal Singh v. King-Emperor* (P.C.):

It is well settled that the unwritten principles of the Constitution of the Empire restrain the Judicial Committee from being used in general as a Court of review in criminal cases. But while the Sovereign in Council does not interfere merely on the question whether the Court below has come to a proper conclusion as to guilt or innocence, such interference ought to take place where there has been a disregard of the pro-per forms of legal process, grievous and not merely technical in character, or a violation of principle in such a fashion as amounts to a denial of justice. Their Lordships have now heard full arguments in the case before them, and have examined the procedure and evidence with some minuteness. Before considering the result, it is right that they should state what they conceive to be, in a case such as that before them, the character of the limitation of their function. The Constitution of the Empire is tending to develop in the direction of regarding as final decisions given in the local administration of criminal justice. The general principle is established that the Sovereign in Council does not act, in the exercise of the prerogative right to review the course of justice in criminal cases, in the free fashion

of a fully constituted Court of Criminal Appeal. The exercise of the prerogative takes place only where it is shown that injustice of a serious and substantial character has occurred. A mere mistake on the part of the Court below, as, for example, in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Courts below.

10. The principles thus enunciated must be deemed well-settled, though there may be considerable room for refinement of argument and divergence of opinion in their application. This is amply indicated by the fact that cases are by no means rare where leave to appeal has been granted after full examination, and yet the appeal has not ultimately been sustained; two such instances are furnished by *Ibrahim v. Regam* their Lordships of the Judicial Committee, when called upon to grant special leave to appeal in civil cases, do take into consideration the general importance of the question raised and the fact that it has evoked great difference of judicial opinion.

11. In the case before us, the legality of the conviction rests upon the correct construction of Section 34 of the Indian Penal Code. The judgments delivered by the Full Bench establish that there has been a deep-seated divergence of judicial opinion in every Superior Court in India as to the true interpretation of that section. The question not only goes to the root of the matter in the present case, but is of great and general importance and of frequent occurrence in the administration of Criminal Law wherever the Indian Penal Code is in operation. It is not the function of this Bench to pronounce an opinion upon the question of the construction of Section 34: we cannot arrogate to ourselves the authority which belongs to their Lordships of the Judicial Committee under clause 41 of the Letters Patent. But this is plain that if Section 34 has not been correctly interpreted by the Full Bench, substantial and grave injustice has been done to the prisoner. In the view we thus take, we shall not express an opinion, whether there may not be other questions also in the appeal, such as the question of the true construction of clause 26 of the Letters Patent, which by themselves being the case within the limited category of criminal proceedings reviewable, according to established practice, by their Lordships of the Judicial Committee. On anxious consideration of the character of the questions involved in this case and full recognition of the principles which regulate the functions of the Judicial Committee in respect of criminal proceedings, we have come to the conclusion that we should declare that this case is a fit one for appeal to His Majesty in-Council under clause 41 of the Letters Patent. We direct accordingly that a certificate be granted to this effect.

12. We further direct that as a certificate under clause 41 has been ordered, the execution of the sentence under appeal be stayed, subject to such orders as may be passed by their Lordships of the Judicial Committee. We are not unmindful of the observations of their Lordships in *Balmukand v. Emperor* made under different circumstances. In that case, an application for special leave to appeal from conviction and

sentences of death, was made to the Judicial Committee. The application was made a few days before the date fixed for the carrying out of the sentences. Counsel for the petitioners stated that they were not in a position to proceed with the petition for leave to appeal as the transcripts of the judgment of the Chief Court and of the evidence had not reached them, and they asked the Board to make an order or a recommendation to the Government of India for the postponement of the execution of the sentences pending the hearing of the petition. Viscount Haldane intimated that their Lordships were unable to advise His Majesty to make any order on the petition for special leave to appeal at that stage or to interfere to stay execution. The attention of their Lordships was not drawn to the fact that in the matter of Abraham Ames when special leave to appeal was granted by the Judicial Committee on the 7th July, 1838, the sentence against the petitioners was suspended; this is not affected by the fact that the leave granted *ex parte* was subsequently revoked. Be that as it may, the petitioners in *Balmukand v. Emperor* were left to notify the Government of India that an application for special leave was pending before the Judicial Committee; this they did, and they were in fact reprimanded, pending the hearing of the petition, which was ultimately dismissed as no ground of appeal was shown to bring the matter within the limited - class of cases where the Judicial Committee intervenes in criminal proceedings. In the case before us, a certificate has been directed under clause 41, and there is consequently an appeal pending from the sentence. Clause 42 ordains that this Court shall, in all cases of appeal to His Majesty in Council, conform to and execute such judgments and orders as His Majesty in Council might think fit to make in the premises; and this has to be read along with Section 21 of the Judicial Committee Act, 1833 (Stat. 3 & 4 Will. 4. c. 41) which renders it obligatory on every Court of Justice to carry into effect the order or decree of his Majesty in-Council on any appeal from its order, sentence, or decree. In such circumstances, it is essential in this case that the sentence passed by this Court should be suspended in order that the appeal to His Majesty in Council may not be frustrated. There is more than one instance where the Court which had passed the sentence stayed execution thereof pending decision of the questions in controversy by their Lordships of the Judicial Committee; see *Nga Hoong v. Queen* decided by the Supreme Court of Hongkong. Reference may in this connection be made to the decision in *Nanda Kishor Singh v. Ram Golam Sahu* where this Court, in exercise of its inherent power to stay proceedings pursuant to its own order, stayed proceedings in a civil matter in view of an application to the Judicial Committee for special leave to appeal to His Majesty in Council. We may add that the applicability of the doctrine of inherent power to criminal cases was expressly recognised by a Special Bench of this Court in *Pigot v. Ali Muhammad Mandal*

13. The prisoner will not be required to furnish security for the costs of the appeal. As Viscount Haldane observed in *Dal Singh v. Emperor*), where the appeal by special leave was ultimately dismissed, " there will, as hitherto has been usual in, such cases, be no order as to costs." The order for costs made in the case of *Annie Besant v. Advocate-General, Madras* must consequently be deemed an exception to the ordinary rule, justifiable only in the special circumstances of that case. We observe that in

Vaithinatha Pillai v. Emperor , Sir Robert Finlay, on behalf of the prisoner whose appeal had succeeded, asked for costs against the Crown; but Lord Atkinson, referring to Johnson v. Reg.stated that their Lordships were of opinion that the application should not be granted. This accords with Pooneakhoty Moodeliar v. Reg. Knapp and Nelson , which was heard shortly afterwards before the Board differently constituted, their Lordships, looking to the exceptional nature of the case, held that the Crown should pay to the appellant the costs of the appeal. A precedent for this course may be found in Macleod v. Attorney-General for New South Walse , We cannot and do not express an opinion as to the costs of the present appeal before the Judicial Committee; we merely hold that in view of the observation of Viscount Haldane in Dal Singh v. Emperor as to the. usual practice in this class of cases, the prisoner be not required to furnish security for the costs of the Crown.

14. We finally direct, under clause 42, that a complete copy of the record (to be printed in the usual manner) be transmitted for the use of their Lordships of the Judicial Committee. This will be prepared, as is done in capital cases, at the cost of the Crown and will include

(i) the record of the proceedings be-fore the Committing Magistrate;

(ii) the record of the proceedings at the Sessions. An accurate copy must be obtained of the notes of the Trial Judge;

(iii) the record of the proceedings under clause 26 of the Letters Patent.

(iv) the record of the present proceedings under clause 41 of the Letters Patent.

15. We further direct that the memorandum furnished by Mr. Justice Page to the members of the Full Bench from which an extract was read out in open (Court) be printed in its entirety as a confidential document and be transmitted in a sealed cover, to be placed before their Lordships for such use as their Lordships may determine. We consider it essential that all the materials available to this Court should be placed at the disposal of their Lordships.

16. Let six copies of the Paper Book when printed be furnished free of charge to the prisoner.