
(1960) 03 BOM CK 0019
In the Bombay High Court
Case No : Jury Reference No. 159 of 1959

State	Vs	APPELLANT
Kawas Manekshaw Nanavati		RESPONDENT

Date of Decision : 30-03-1960

Acts Referred:

Constitution of India, 1950 — Article 161, 361, 72
Criminal Procedure Code, 1898 (CrPC) — Section 307, 75(2), 93
Navy Act, 1957 — Section 122, 123, 146, 3(12), 53(16)
Supreme Court Rules, 1966 — Order 21 Rule 5

Citation : AIR 1960 Bom 502 : (1960) 62 BOMLR 383 : (1960) CriLJ 1558 : (1960) NLJ 371

Hon'ble Judges : Chaiani, C.J;S.T. Desai, J;Mudholkar, J;K.T. Desai, J;Gokhale, J

Bench : Full Bench

Advocate : H.M. Seervai, General and Government Pleader, for the Appellant; Rajni Patel, N.A. Palkhiwala and S.R. Vakil, Mulla and instructed by Mulla and Craigie Blunt and Caree, K.M. Nanavati, R.B. Kotwal and M.V. Paranjpe for Western India Advocate Association, A.A. Peerbhoy and Daniel Latiff for Bombay Bar Association, for the Respondent

Judgement

Chainani, C.J.

(1) In Criminal Reference No. 159 of 1959, which was made to this Court u/s 307 Cr. P. C. by the Sessions Judge, Greater Bombay, a Division Bench of this Court, consisting of Shelat and Naik, JJ. found the accused commander K. M. Nanavati guilty of the offence of murder and sentenced him to imprisonment for life. The accused was then in naval custody and the Court directed that a warrant for his arrest should issue. This decision was given on Friday, 11th March 1960. An application for leave to appeal to the Supreme Court was made soon after the judgment was pronounced. This was fixed for hearing on the following Monday, 14th March. A writ communicating the order of this Court was sent to the Sessions Judge, Greater Bombay, who issued a warrant for the arrest of the accused and sent it to the police officer in charge of the City Sessions Court for

Greater Bombay for execution. The warrant was returned unserved by the police officer with a report, in which he stated that he had been supplied with a copy of an order passed by the Governor of Bombay under Article 161 of the Constitution of India, suspending the sentence passed by this Court. The Sessions Judge then returned the writ together with the unexecuted warrant to this Court. The papers were placed before the Division Bench on 14th March 1960, which directed that in view of the unusual and unprecedented situation created by the order of the Governor the matter should be referred to larger Bench. Notice was then issued to the State and to the accused and this Full Bench was constituted to consider the matter.

(2) When the matter came up for hearing, Mr. Kotwal on behalf of the Western India Advocates' Association asked for permission to appear in the case along with Mr. Paranjpe. This was objected to by the Advocate General and the counsel for the accused. As, however, both of them were appearing in order to support the order made by the Governor and as the issues involved are of considerable importance, we allowed Mr. Kotwal to appear in order that the other point of view may also be placed before us. Subsequently, on a request made by Mr. Peerbhoy, we permitted him to appear along with Mr. Latiff on behalf of the Bombay Bar Association. We must express our appreciation to the Bombay Bar Association in appearing in this proceeding. We thank the Advocate General, Mr. Kotwal and Mr. Peerbhoy for the assistance, which we have received from them.

(3) The principal question, which we have to determine, is whether there is a proper return to the writ issued by this Court, that is, whether the warrant for the arrest of the accused has not been executed for good and valid reasons. For this purpose it is necessary to decide whether the action taken by the Governor is within the law. We therefore informed the Advocate General and the other counsel that the two main questions, which arose for our consideration, were, (1) whether the order issued by the Governor is legal and constitutional, and (2) if not, how the writ issued by this Court can be made effective. The Advocate General raised a preliminary objection that we had no jurisdiction to examine the validity of the action taken by the Governor, because there is no judicial proceeding pending, in which we can decide this question. The parties to the Criminal Reference No. 159 of 1959 were the State on one side and the accused on the other. Both of them are satisfied with the Governor's order. The Advocate General, therefore, contended that there are no parties, between whom any question has arisen, which can be judicially decided by this Court. He referred to a passage at page 91 of Willis on Constitutional Law, 1936 edition, in which it is stated that anyone whose rights are injuriously affected, and no one else, may raise questions of constitutionality of a statute. He also urged that the Court had become functus officio, as soon as it had pronounced judgment in the above Criminal Reference. All that remained thereafter was to carry out the order of the Court. This was an executive function, see *Mathammal Saraswathi Vs. The State of Kerala*, . The Advocate General also referred to AIR 1945 18 (Privy Council) , in which it was held that the functions of a Court begin when a charge is preferred

before it and not until then and that u/s 561A the High Court has no power to interfere with the investigation of a crime and to quash the investigation proceedings. Consequently the Advocate General argued that there is no judicial proceeding, in which we can consider the question whether the order issued by the Governor is legal.

(4) M. Kotwal, on the other hand, contended that the Governor's order had come into the way of the execution of the warrant is lawful or not. He referred to sub-section (2) of S. 75, Cr. P. C. which states that every warrant of arrest issued by a Court shall remain in force until it is cancelled by the Court which issued it or until it is executed. This section occurs in part of Chapter VI which relates to processes to compel appearance section 93, however, makes the provisions of this section applicable to every warrant of arrest issued under the Code. Mr Kotwal argued that when a warrant is returned unexecuted, the Court must determine whether the obstruction caused was lawful or not. If it was lawful, the Court would cancel the warrant. Otherwise it would send back the warrant for execution and take action in contempt against those responsible for preventing its execution. The present inquiry is to determine what should be done with the warrant, which has been returned unexecuted.

(5) We are inclined to accept the arguments of Mr. Kotwal. If a writ issued by a Court is returned unexecuted, the Court is entitled to inquire as to why it was not executed. The execution of an order made by a court may be an executive function. But if an obstruction is caused in its execution, the question whether it was lawful or not can only be determined judicially. In this proceeding we have to consider and decide whether the reasons given for not carrying out the order of this Court are good and valid. For this purpose it is necessary to examine the validity of the action taken by the Governor. We hold that we have jurisdiction to determine this question.

(6) The Advocate General also contended that the Governor's action cannot be challenged in this proceeding, because the Governor is not represented before us and also because under Article 361 of the Constitution the governor is not answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. This article only gives personal protection to the Governor. No proceeding is however being held against the Governor. He is not being asked to answer for anything done by him. It is also not proposed to quash or set aside his order. The legality of his order has to be examined only in order to determine whether there is a valid return to the writ issued by this Court. If we had come to the conclusion that the Governor's order was invalid, we would have issued a writ to the officer now holding the accused in custody to hand him over. No writ or order would have been issued to the Governor. Consequently, it is not necessary that the Governor should be a party to the proceeding in order to enable us to decide whether there were good

and sufficient reasons for not complying with the order of this Court.

(7) Article 161 confers discretionary powers on the Governor. Mr. Kotwal urged that any order made in exercise of such discretionary powers must satisfy the following conditions:

- (1) The authority must be competent to make such an order,
- (2) the order should not be in excess of the powers conferred,
- (3) the powers must be used and the order made in the manner laid down by statute,
- (4) if the statute imposes any limitations on the exercise of the powers, these should not be exceeded, and
- (5) the order should not be made for a purpose for which the power was not intended to be exercised

He contended that if any of these conditions is not satisfied, the order made can be challenged in a Court. Article 256 of the Constitution states that the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State. Even a Governor must therefore act according to law and he cannot exceed the powers conferred upon him. For instance, under Article 161 the Governor can grant a pardon to a person convicted of any offence against any law relating to a matter to which the executive power of the State extends. He has no power to grant a pardon in respect of other offences. If, therefore, in any case it is alleged that the Governor has exceeded his powers by granting pardon in respect of an offence against any law not relating to a matter to which the executive power of the State extends, this Court will be competent to inquire into that question and decide whether the action taken by him is within the law, even though it will not be possible to make any order against the Governor personally. I may add that even in England the validity of an act purporting to be done under the prerogative can be investigated by Courts, see p. 127 in *Wade and Phillips on Constitutional Law* and *Halsbury Volume 7*, p. 221, where in para 464 it has been observed that the Courts have jurisdiction to inquire into the existence or extent of any alleged prerogative. The Nagpur High Court has taken the same view in *G. D. Karkarey v. T. L. Shevde*, ILR 1952 Nag 409 : AIR 1952 Nag 330 it was observed:

"We cannot accede to the contention that because His Excellency the Governor is not amenable to the process of the Court, this Court cannot examine his action in appointing the non-applicant and pronounce upon its legality. The immunity afforded by Article 361 is personal to the Governor. That Article does not place the actions of the Governor purporting to be done in pursuance of the Constitution beyond the scrutiny of the Courts. What the Constitution establishes is supremacy of law and not of men, however high-placed they might be. Unless there be a provision excluding a particular matter from the purview of the

Courts, it is for the Courts to examine how far any act done in pursuance of the Constitution is in conformity with it.

If a question about the validity of an enactment assented to by the Governor can be considered and decided in the absence of the Governor, we see no force in the objection that an appointment made by the Governor cannot be questioned in his absence.

(7a) The order issued by the Governor is in the following terms:

"In exercise of the powers conferred on me by Article 161 of the Constitution of India, I, Shri Prakasa, Governor of Bombay, am pleased hereby to suspend the sentence passed by the High Court of Bombay on Commander K. M. Nanavati in Sessions Case No. 22 of Fourth Sessions of 1959 until the appeal intended to be filed by him in the Supreme Court against his conviction and sentence is disposed of and subject meanwhile to the conditions that he shall be detained in the naval jail custody in I. N. S. Kunjali."

It is signed by the Governor himself. This order was made when the application made by the accused for leave to appeal to the Supreme Court was pending before this court. No application had been made to this Court for releasing the accused on bail or for his being detained in Naval custody, pending the disposal of his appeal to the Supreme Court. The order also suspends the sentence, not for a few days, but until the appeal, if any, filed in the Supreme Court has been disposed of. This in the nature of things must take some considerable time. The order does not appear to have been drafted carefully. It "suspends the sentence passed by the High Court of Bombay on Commander K. M. Nanavati in Sessions Case No. 22 of Fourth Sessions of 1959." The proceedings in this Sessions Case terminated when a Reference u/s 307, Criminal Procedure Code was made to this Court. The sentence was, therefore, passed not in the Sessions case but in Reference No. 159 of 1959.

(8) We asked the Advocate General whether government desired to tell us the reasons, which led the governor to make the above order. The Advocate General stated that the order had been made by the Governor after consultation with the Chief Minister, but that he had been instructed not to disclose the reasons. The Governor was not before the Court and the reasons were relevant only on the question of the propriety of the order and the rightness of the executive action. The Advocate General also stated that a statement would be made in the Legislature after we had disposed of this matter.

(9) The necessity of vesting the power of mercy, pardon and reprieve in some authority other than the judiciary has always been recognised. In the words of Marshall C. J., "the Judge sees only with judicial eyes and knows nothing respecting any particular case, of which he is not informed judicially." A Judge cannot take cognizance of facts and circumstances, which are not brought to his notice judicially. He must also act in accordance with law. The law may sometimes be so rigorous that it may in the interests of justice to mitigate its severity. Many

laws such as Section 397 I. P. C. prescribe minimum sentences of imprisonment for certain offences. Experience shows that these minimum sentences are sometimes unduly severe. The minimum sentences of imprisonment for certain offences. Experience shows that these minimum sentences are sometimes unduly severe. The minimum sentence having been prescribed by law, the Judge cannot reduce or remit it. Power must also exist to avoid grave miscarriage of justice or possible errors in judicial determination, e.g., where through a mistake a wrong person has been convicted. The wisdom of investing the head of the State with the power of pardon and mercy cannot, therefore, be doubted. The power must also exist in its widest amplitude, as it is not possible to visualise all cases in which the exercise of this power may become necessary or desirable. It is a power essentially in aid of justice, to be exercised, as an act of grace and humanity, in order to do justice. The power should be used, to quote the words of Taft C. J. in *Ex parte Grossman* (1925) 69 Law Ed 527, "to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law." In the same case the learned Chief Justice has observed:

"It is a check entrusted to the Executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it."

These observations, with which we respectfully agree, apply with equal force to the power conferred by Article 161 of the Constitution.

(10) In India the power of clemency and pardon is vested in the President and Governors of States by Articles 72 and 161 of the Constitution. Article 72(1) states:

"The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence

- (a) in all cases where the punishment or sentence is by a Court Martial;
- (b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;
- (c) in all cases where the sentence is a sentence of death."

Clause (3) of this Article provides :

"Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force."

Article 161 is in the following terms:

"The Governor of a State shall have the power to grant pardons, reprieves,

respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends."

Section 40, Criminal Procedure Code also empowers the appropriate Government to suspend the execution of a sentence or to remit it. Section 402 confers the power to commute a sentence. The powers under these two sections are limited to suspension, remission and commutation of a sentence.

(11) In England, the power has been exercised from time immemorial and has always been regarded as a necessary attribute of sovereignty. The nature of the royal prerogative of pardon is explained in the following statement of law by Lord Coke:

"A pardon is said to be a work of mercy, whereby the king, either before attainder, sentence or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt or duty, temporal or ecclesiastical. And the King's coronation oath is, "that he will cause justice to be executed in mercy"."

The sovereign also enjoys the power to grant a reprieve. A reprieve is the withdrawal of a sentence for an interval of time, whereby its execution is suspended. It postpones the execution of a sentence for some time. It is grantable by the Crown (ex mandate regis) at its mere discretion; and it is discretion, whenever substantial justice requires it, or ex necessitate legis, see para 398 on page 221 in Archbold's Criminal Pleadings, Evidence and Practice, 1954 edition, and American Jurisprudence, Volume 39, page 524, 1955 edition.

(12) In England pardon may be granted either before or after conviction, see para 525 in Halsbury's Laws of England, Volume 7, 1954 edition.

"A pardon other than a pardon under statute must be specially pleaded at the first opportunity the prisoner has of so doing If a pardon is granted after plea pleaded advantage of it may be taken at any time, after verdict in arrest of judgment, and after judgment in arrest of execution," see Halsbury, Volume 10, para 735, 1955 edition.

A pardon may therefore be granted even during the pendency of a judicial proceeding and its effect is to bring the proceeding to an end.

(13) Before the Constitution came into force, the Sovereign's prerogative of pardon and reprieve was exercised in India by the governor-General as his delegate under S. 295 of the Government of India Act, which provided as follows:

"(1) Where any person has been sentenced to death in a Province, the governor-General in his discretion shall have all such powers of suspension, remission or commutation of sentence as were vested in the Governor-General in Council immediately before the commencement of part III of this Act, but save as aforesaid no authority in India outside a Province shall have any power to

suspend, remit or commute the sentence of any person convicted in the Province:

Provided that nothing in this sub-section affects any powers of any officer of His Majesty" force to suspend, remit or commute a sentence passed by a court martial.

(2) Nothing in this Act shall derogate from the right of His Majesty, or of the Governor-General, if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment".

Sub-section (5) of S. 401 Cr. P. C. as it then stood provided that nothing contained in that section shall be deemed to interfere with the right of His Majesty or of the governor-General when such right is delegated to him to grant pardons, reprieves, respites or remissions of punishment. As in granting a pardon, the Governor-General exercised the Sovereign's prerogative, the law in India was the same and a pardon could be granted even before conviction.

(14) An instance of the exercise of the power of reprieve is to be found in *Balmukand v. Emperor* 42 Ind App 133 : AIR 1915 PC 29. The facts in this case were no doubt peculiar. Four persons had been convicted of murder and three of them had been sentenced to death. The accused then applied for special leave to appeal to the Privy Council and also prayed for postponement of the execution of the sentences until the hearing of the petition for special leave. The date fixed for carrying out the sentences was a few days after the date on which the petition had been presented. The Privy Council refused to stay execution of the sentences of death and observed that the prerogative of pardon was a matter for the executive Government and the petitioners were advised to approach the Government of India and notify them that an appeal to the Privy Council was pending. The petitioners were then reprieved by the Government of India pending the hearing of the petition for leave to appeal.

(15) In America the power to grant pardon and reprieve is vested in the President of the United States. In the States it is conferred on the governor or on a board of which the governor is a member. Article II S. 2 of the constitution of the United States defines the President's power in such matters and states: "and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment". The decisions of the Supreme Court of the United States show that this Article was interpreted by a reference to common law and to the law of pardon as it prevailed in England. As long ago as 1833 in *United States v. Wilson* (1861) 8 L Ed. 640, Marshall C. J. traced the history of the Royal Prerogative in Great Britain and observed :

"As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt this principle respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it"

See also *Ex parte Wells* (1868) 15 L Ed 421 69 I Ed 527. The United States has therefore adopted the English law of pardon and conferred on the President the same privileges as are exercised by the Sovereign in Great Britain. This power may be exercised at any time after the commission of an offence, even during the pendency of a legal proceeding, see *Ex parte A. H. Garland* (1871) 1 L Ed 366, in which Field J. states:

"The Constitution provides that the President shall have power to grant reprieves and pardons for offences against the United States except in cases of impeachment.

The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."

Having regard to the language used in Articles 72 and 161 of our Constitution, which is similar to that used in s. 295(2) of the Government of India Act and Art. II of the American Constitution, it seems to us that the framers of our Constitution intended to confer on the President and the Governors, within their respective spheres, the same power of pardon, reprieve and clemency, both in its nature and effect, as is possessed by the Sovereign in Great Britain and by the President in the United States. In India also, the power of pardon can, therefore, be exercised, before, during or after trial. This view has been taken by the Madras High Court in *In Re: Maddela Yerra Channugadu and Others*, .

(16) The validity of the order of the Governor was first challenged by both Mr. Kotwal and Mr. Peerabhoy on the ground that it was made when the application for leave to appeal to the Supreme Court was pending before this Court and when the processes of law were not complete. The argument was that as a result of the order made by the High Court in the Criminal Reference, the naval custody, in which the accused was previously detained, came to an end and that thereafter the accused was to be detained in the ordinary jail. The Governor's order, however, directs that the accused shall be detained in naval jail custody. It was contended that his order overrides or nullifies the order made by the High Court and in fact amounts to contempt of the High Court. Reference was made to Articles 215, 216 and 256 of the Constitution. Article 215 states that every High Court shall be a court of record and shall have all the powers of such a Court including the power to punish for contempt of itself. Article 226 empowers the High Court to issue directions, orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them for the enforcement of any of the fundamental rights and for any other purpose. Article 256 provides that the executive authority of every State shall be exercised so as to ensure compliance with the laws which are in force in the

State. It was urged that by reason of these Articles, the Governor could not issue any order, which was in conflict with that made by the High Court. It was also urged that in order that there may be no such conflict, Article 161 should be so interpreted that the powers under this Article cannot be exercised when a judicial proceeding is pending or when the processes of law are still not complete. The Advocate General, on the other hand, argued that the judicial and executive powers are distinct and separate powers, that both these powers have been conferred by the Constitution, the judicial power upon the judiciary to be exercised by it on judicial considerations, and the executive power upon the executive to be exercised by it for political and other reasons, which may not be germane for consideration in a Court of law, that these powers operate in different fields and are to be exercised for different purposes, and that consequently, even if there is a conflict, it will not be deemed to be a conflict in law. He relied on the decision of the Federal Court in *Province of Madras v. Boddu Paidanna and Sons* 1942 FCR 90 : AIR 1942 FC 33, and of the Privy Council in AIR 1945 98 (Privy Council) in which it was held that even if there was overlapping between the power given to the Central Legislature to levy a duty of excise and the power given to the Provincial Legislature to levy a tax on sale of goods, there was in law no overlapping.

(17) It seems to us that if pardon can be granted during the pendency of a judicial proceeding, it is not possible to hold that the other allied but lesser powers of reprieve, suspension of sentence, etc. cannot be so exercised. The powers conferred by Art. 161 are also such that any order made in exercise of those powers must necessarily affect or alter the effect of the judgment of a Court. If a person is pardoned after he had been found guilty and convicted by a Court, its effect will be to clear the person from all consequences of the offence for which it is granted. Notwithstanding the decision of a Court finding him guilty of the offence, he will be deemed not to have committed the offence if it is pardoned. Similarly, the effect of remission of a sentence is that in spite of the decision of the Court imposing a sentence, the accused will not be required to undergo any sentence. Any order issued under Article 161 must, therefore, to some extent conflict with the decision of a Court. Consequently, an order made under Art. 161 cannot be held to be illegal, merely because there is a conflict between it and the order made by a Court. The Article, covering as it does the field of mercy and pardon, should be liberally construed. Moreover, the words of Art. 161 are very wide and do not contain any limitation as to the time at which, the occasion on which, or the circumstances in which the powers conferred by this Article may be exercised. The powers having been conferred by the Constitution itself and being unqualified in terms, it is not permissible to us to put any fetters or restrictions on them. Much as though we may not like the Governor's acting in this case, immediately after this Court had delivered its judgment and when the application for leave to appeal to the Supreme Court was pending in this Court, we cannot hold the order of the Governor to be illegal on that ground.

(18) Another contention of Mr. Kotwal and Mr. Peerbhoy was that under Art. 161 the Governor cannot impose any conditions, if he suspends a sentence. Section 401 specifically empowers Government to suspend a sentence without conditions or upon any conditions. The absence of similar words from Art. 161 was emphasised in support of the argument that a conditional order of suspension cannot be made under Art. 161. In our opinion there is no force in this argument. The power to suspend a sentence would include the power to attach lawful conditions to it. This has been so held both in England and America in regard to the power of pardon, see para 526 in Halsbury, Volume 14, p. 243, (1868) 15 Law ED 421 and United States v. Klein (1873) 20 L Ed 519. It is true that in America the only power enjoyed by the President is to grant a pardon or a reprieve. The commutation of a sentence is therefore effected by granting conditional pardon. The position in England is the same, see Forsyth on Cases and Opinions on Constitutional Law, 1869 edition, in which at p. 463 it has been observed that the Crown has no power, except when such a power is expressly given by an Act of Parliament, to commute a sentence passed by a Court of justice and that practically indeed commutation of punishment has long taken place under the form of conditional pardons. In the footnote at p. 460 in the same book it has been observed that the Crown may extend its mercy on what terms it pleases and consequently may whether precedent or subsequent, on the performance whereof the validity of the pardon will depend. If therefore a pardon can be made conditional, a sentence can also be suspended on conditions. The conditions should, however, not be illegal, immoral or impossible of performance.

(19) It was strongly urged by both Mr. Kotwal and Mr. Peerbhoy that the condition imposed by the Governor, that the accused shall be detained in naval jail custody pending the decision of the Supreme Court, is illegal. Three grounds were urged in support of this argument. These are, firstly, that the executive authority of the Governor does not extend to naval prisons and that consequently the Governor could not direct that the accused shall be detained in a naval jail. The second ground is that under the Navy Act a commissioned officer like the accused cannot be detained. The third objection raised to the validity of the condition is that there is no provision in the Navy Act, under which a person, who has been tried in an ordinary criminal Court for the offence of murder, can be detained in a naval jail after his conviction.

(20) In regard to the first ground, the words "shall be detained" in the order of the Governor no doubt suggest that it is a direction given by the Governor. We must, however, assume that the Governor was aware of the constitutional limitations on his powers and that he knew that he could not issue any orders to the Navy in this matter. Reading the order as a whole, it appears that what the Governor intended was that the sentence should be suspended so long as the accused remains in naval jail custody. No doubt the order says that "he (Nanavati) shall be detained in the Naval Jail Custody", but the word "shall" is not, in the context, used as a word of "command". It has to be read in the context of the preceding words "subject meanwhile to the condition". Thus read,

it does not appear to be imperative. For, a "condition" and a "command" cannot well go together. "Command" stands by itself and it will be incongruous to say that it shall take effect as a "condition". Consequently, we cannot say that the Governor has issued any order directing any naval authority to keep the accused in a naval jail.

(21) The second objection is based sub-section (10) of S. 82 of the Navy Act, which states that no officer shall be subject to detention. The word "officer" is defined in clause (16) of S. 3 of the Act as meaning a commissioned officer. The accused Commander Nanavati is a Commissioned Officer. He could not, therefore, be subjected to detention. The word "detention" in sub-section (10) of S. 82 is, however, used in the sense in which it is used in clause (d) of sub-section (1) of S. 81, which specifies the punishments which may be inflicted under the Act. In view of the prohibition contained in S. 82(10), the punishment of detention cannot be awarded to a commissioned officer like the accused. A distinction must, however, be drawn between detention as a measure of punishment and detention in custody, say, pending trial. It is clear from the order of the Governor that the word "detained" as used in that order means "kept in custody". As the Governor has suspended the sentence, it could not have been his intention to inflict the punishment of detention on the accused. In fact he was not competent to do so. Consequently, the challenge to the order on this ground must fail.

(22) The accused was arrested on 27-4-1959. He was produced before the Additional Chief Presidency Magistrate, Greater Bombay on 28th April. The Magistrate remanded him to police custody on that day. On 29-4-1959 the Magistrate received a letter from the Flag Officer, Bombay, in which he stated that he was willing and ready to take the accused in naval custody as defined in S. 3(12) of the Navy Act, 1957, and that the accused would be detained under the orders of the Naval Provost Marshall in exercise of his authority under S. 89(2) and (3) of the Navy Act. The Magistrate then made an order by which he directed that the accused should be detained in the Naval Jail and detention quarters in Bombay. The Magistrate has stated in his order that he had been moved under the instructions of the Government of India. The accused continued to remain in this custody until the reference was heard by the High Court.

(23) The third ground, on which the order has been challenged, is that the detention of the accused in the naval jail after his conviction is illegal that the condition, on which the sentence has been suspended, can be fulfilled only, if the accused is detained in the naval jail, that this condition is therefore invalid and that consequently the whole order is also illegal. In this connection it is necessary to mention certain facts and the relevant provisions of the Navy Act.

(24) Section 2 of the Navy Act 1957 specifies the classes of persons, who are subject to naval law. Sub-section (3) of S. 3 defines a civil offence as meaning an offence triable by a Court of ordinary criminal jurisdiction in India. "Naval offence" is defined in clause (13) as meaning any of the offences under Ss. 34 to

76. The Act therefore draws a distinction between civil and naval offences. "Civil prison" is defined in clause (4) of the same section as meaning any jail or place used for the detention of any criminal prisoner under the Prisons Act, 1894 or under any other law for the time being in force. Clause(12) defines "naval custody" as meaning the arrest or confinement of a person in the prescribed manner or in accordance with the usages of the naval service and including military or air force custody. S. 157 of the Navy Act empowers the Central Government to set apart any buildings or vessels or any parts thereof as naval prisons. Naval prisons are therefore different from ordinary jails or prisons, which are referred to in the Act as civil prisons. Chapter VIII of the Act contains provisions in regard to offences committed by persons subject to naval law. Secs. 34 to 76 deal with naval offences. Sub-section (1) of Section 77 states that every person subject to naval law who commits a civil offence punishable with death or with imprisonment for life shall be punished with imprisonment assigned for that offence. Sub-section (2) of this section provides punishment for civil offences other than those punishable with death or imprisonment for life. Sub-section(2) of Section 78 states as follows:

"A person subject to naval law who commits an offence of murder against a person not subject to army, naval or air force law or an offence of culpable homicide not amounting to murder against such person or an offence of rape in relation to such person shall not be tried and punished under this Act unless he commits any of the said offences

(a) while on active service; or

(b) at any place outside India; or

(c) at any place specified by the Central Government by notification in this behalf.

If therefore a person subject to naval law commits murder of a civilian, that is a person not subject to army, naval or air force law, at any place other than that referred to in clause(a), (b) or (c) in sub-section(2) of Section 78, he cannot be tried under the Act, but he must be tried in an ordinary criminal Court. It was on account of this provision that the accused was not tried under the Navy Act, but in the Session Court, Greater Bombay.

(25) Sub-section (3) of Section 84 of the Navy Act states that a Provost Marshall may arrest any person subject to naval law in accordance with the provisions of Section 89. Sub-section (2) of Section 89 provides that the duties of a Provost Marshall are to take charge of persons in naval custody. Sub-section (3) of this section states that a Provost Marshall may at any time arrest and detain for trial any person subject to naval law, who commits or is charged with an offence and may also carry into effect any punishment to be inflicted in pursuance of a sentence passed under the Act. A Provost Marshall can therefore arrest and detain for trial a person subject to naval law who has committed an offence of murder. It was under these provisions that the accused was detained pending trial in the naval jail in Greater Bombay.

(26) Sub-section (1) of S. 150, which occurs in Chapter XIV, the heading of which is "Execution of sentences", provides that every term of imprisonment may be served in a naval prison, naval detention quarters or in any civil prison, house of correction or military or air force prison or detention barracks. Sub-section(3) of this section and the other provisions contained in Chapter XIV show that this section is intended to apply in the case of sentences awarded under the Act. There is no provision in the Act, which provides for the detention in a naval jail or naval custody of person subject to naval law, who has been convicted for the offence of murder by an ordinary criminal Court.

(27) It was strenuously argued by Mr. Kotwal and Mr. Peerbhoy that the words "shall be detained" in the Governor's order imply that the accused shall be detained by some officer having lawful authority to do so, that the Navy Act does not contain any provisions under which the accused could have been detained in naval custody after his conviction, that his detention in the naval jail is therefore illegal, that consequently the condition, on which the sentence has been suspended, is one which could not lawfully have been complied with and that as this condition constitutes an integral part of the order, the whole order is bad in law. The Advocate General conceded that th condition is an integral part of the order. We have given our anxious and careful consideration to these arguments.

(28) In reply to these arguments, the Advocate General contended that under S. 3(12) naval custody included custody in accordance with the usages of the naval service, that there is no evidence before us as to what the usages of the navy are and that consequently we cannot say that the detention in this case is not justified by naval usages. It may, however, be noted that the words "in accordance with the usages of navel service" follow the words " in the prescribed manner". It seems to us therefore that the usages referred to are usages in regard to the mode and manner of arrest and confinement and not usages under which a person can be kept in custody or confinement.

(29) The Advocate General also urged that a trial does not end untill the matter has been finally decided by the highest Court, which is capable of deciding such matter and that consequently the trial of the accused in this case cannot be said to have concluded until his appeal to the supreme Court has been decided. He has relied on *Vander Poorten. v. Settlement Officer* 1946 A. C. 271 and *Madhub Chunder Mozumdar v. Novodeep Chunder* I. L. R. 16 Cal 121. In the former case the Privy Council held that the word "trial" in S. 20 of the Ceylon West Lands Ordinance in its context included "decision". There is nothing in their decision which supports the argument that "trial" also includes "proceeding in appeal". In *Madhub Chunder Mozumdar v. Novodeep Chunder* I. L.R. 16 Cal. 121, it was held the words "shall try any person" used in S. 487 of the Cr. P. C. include the hearing of an appeal. A different view has been taken by the Madras High Court in *Re Kesavariya*, 2 Weir 607. The word "trial" is not used in S. 487 and in *Madhub Mozumdar's* case I. L. R. 16 Cal. 121 the particular view was taken having regard to the context in which the words "shall try" occur in the section.

The section states that no Judge of a criminal Court or Magistrate shall try any person for any offence referred to in S. 195, when such offence is committed before himself or in contempt of his authority or is brought to his notice as such Judge or Magistrate in the course of a judicial proceeding. It was, therefore, held that the District and Sessions Judge, who has himself sanctioned the prosecution of the accused, could not hear his appeal against his conviction. This case also does not lend any support to the argument advanced by the Advocate-General that the trial continues until the appeal has been disposed of. On the other hand in *Public Prosecutor v. Chockalinga Ambalam* ILR 52 Mad. 335 : AIR 1929 Mad 201, it was held that a trial, as that word is used in the Cr. P. C., is completed, before the judgment is pronounced.

(30) The word "trial" is well understood in criminal law and it ends when the proceedings in the trial come to an end. The various provisions of the Navy Act, to some of which I will refer, also show that the word "trial" is used in the same sense in this Act. Chapter XIII contains provisions with regard to trials before a Court Martial. Sub-sect.(1) of S. 122 states that a Court Martial shall sit from day to day with the exception of Sundays, until the trial is concluded. The proviso to sub-section (2) of S. 122 states that if any member of the Court Martial is absent from any part of the trial, he shall not thereafter take any part in the proceedings. The expression "trial" is therefore used in the sense of proceedings before a Court Martial and it ends when these proceedings come to an end. Sub-sec.(2) of S. 123 states that whenever a Court Martial is dissolved, the accused may be retried. Section 145 empowers the Court Martial to make such order as it thinks fit for the proper custody of property regarding which an offence appears to have been committed or which appears to have been used for the commission of an offence pending the conclusion of the trial. Sub-sec(1) of S. 146 states that when the trial before any Court Martial is concluded, the Court may make such order as it thinks fit for the disposal of the property produced before it or in its custody. It is clear from these and other provisions of the Navy Act that the term "trial" in this Act is also used in the same sense in which it is ordinarily understood in criminal law and means proceedings in the trial Court. The trial of the accused in this case, therefore, ended when the Sessions Judge made a reference to this Court or at least when the High Court delivered its judgment on the reference made to it. The accused could not thereafter be detained in a naval jail under S. 89(3) of the Navy Act. There is also no other provision in the Navy Act, which authorises his detention in a naval jail after he had been convicted.