

## CRIMINAL REFERENCE.

1913  
July 21.

*Before Imam and Chapman JJ.*

GULLI SAHU

v.

EMPEROR.\*

*Extradition—Proceedings before the Magistrate without jurisdiction—Power of High Court to interfere with order directing delivery of fugitive offender—Extradition Act (XV of 1903), ss. 10, 15.*

Section 15 of the Extradition Act ousts the jurisdiction of the High Court to inquire into the propriety of a warrant issued under Chapter III. Where, however, the order of the Magistrate is sought to be justified under an authority supposed to be derived from the law, but is in fact without jurisdiction, such order is revisable by the Court at the instance of the party whose liberty is affected by it.

*Emperor v. Huseinally Niazally* (1), *In the matter of Ahadyer* (2) followed.

*Attorney-General for Hong Kong v. Kwok-a-Sing* (3) referred to.

The High Court set aside the order of the Magistrate directing the delivery of a fugitive offender to the Nepal authorities where he had issued the warrant, at least in the case of one accused, on mere information, without any evidence, where he had failed to report the issue of the warrants to the Political Agent in Nepal, had made an inquiry into the case without a warrant issued by the Political Agent, and had ordered the surrender on a procedure not known to the Extradition Act.

THE facts of the case were as follows. In Bhadra 1966 (1909) some six persons, including Gulli Sahu and Gobind Sahu, were alleged to have committed an assault on one Peary Goar in Nepal, under the order

\* Criminal Reference No. 128 of 1913, by R. L. Ross, Sessions Judge of Darbhanga, dated May 21, 1913.

(1) (1905) 7 Bom. Law Rep. 463, 467.

(2) (1886) Punj. Rec. 45, 52.

(3) (1878) L. R. 5 P. C. 179, 199.

of Jia Lall, a zemindar of village Malinia; from the effects of which he was said to have died. His widow lodged a complaint, on 26th Jeth 1967, and two of the assailants were tried in Nepal, convicted and sentenced, the one to death and the other to transportation for life. On the 29th January 1912, the Sub-Inspector of Phulpur thana wrote to the Lieutenant of Hanu-mannagar, whose position corresponded with that of a British Subdivisional Magistrate, inquiring if Gulli Sahu was wanted by the authorities in Nepal for murder. The Lieutenant replied, on the 22nd February 1912, asking for his arrest and promising to send proofs of the offence and of the nationality of the prisoner. On the 9th March, the Subdivisional Officer of Madhubani issued a warrant for Gulli Sahu's arrest and released him on bail. On the 12th January 1913, the Lieutenant sent the evidence, as promised, to the Subdivisional Officer, and also requested the arrest of Gobind Sahu. Gobind was accordingly arrested on 3rd March and released on bail. After taking evidence for the prosecution and the defence the Magistrate, by his judgment, dated 20th April 1913, directed the surrender of the two accused to the authorities in Nepal. The Sessions Judge of Darbhanga thereupon reported the case to the High Court under s. 438 of the Criminal Procedure Code.

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*Mr. W. Jackson, Mr. K. N. Chaudhuri and Babu Rajendra Prasad*, for the accused.

*The Deputy Legal Remembrancer (Mr. S. Ahmed)*, for the Crown.

*Cur. adv. vult.*

IMAM AND CHAPMAN, JJ. This is a Reference by the Sessions Judge of Darbhanga, under section 438 of the Criminal Procedure Code, recommending for revision an order passed by the Subdivisional Magistrate of

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In Bhadra 1966 (1909) Gulli Sahu and Gobind Sahu with four other persons are said to have assaulted one Peary Goar under the orders of a zemindar, one Jia Lall, in village Malinia within the territory of Nepal. Seven days after the assault Peary Goar is alleged to have died. His widow, Musammat Bhagwatia, laid a complaint before the Nepal authorities on 26th Jeth 1967. Two out of the four other persons were tried in Nepal and convicted. One of the two was sentenced to be hanged and the other sentenced to transportation for life. On the 29th January 1912, the Sub-Inspector of Phulpar police-station, within the subdivision of Madhubani, sent an enquiry slip, through the Sub-divisional Officer, to the Lieutenant of Hanumannagar, in Nepal, enquiring if one Gulli Sahu was wanted by the authorities of Nepal in the case of the murder of a *goala*. The Lieutenant, whose official position corresponds to that of a Subdivisional Officer in British India, replied on 22nd February 1912 that Gulli Sahu was accused in that case and asked for his arrest, promising to send proof of criminality and nationality. On the 9th March 1912, the Subdivisional Magistrate of Madhubani issued a warrant of arrest against Gulli Sahu who, on surrendering before the Magistrate on 18th November 1912, was released on bail by that Magistrate. On the 12th January 1913, the Lieutenant of Hanumannagar sent the evidence of criminality and nationality to the Subdivisional Magistrate and requested that Gobind Sahu should also be arrested. On 3rd March 1913, Gobind Sahu was arrested and released on bail. After examining witnesses for the prosecution and the defence, the Subdivisional Magistrate by his judgment, dated the 20th April 1913,

directed the surrender of the accused, Gulli Sahu and Gobind Sahu, to the Nepal authorities. The Magistrate concludes his judgment thus:—"The accused, I hold, have committed an offence and are fugitives from justice, and should, therefore, be surrendered to meet the charge."

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The learned Judge in making this Reference to us points out (i) that there is a conflict of evidence as to the nationality of the accused; (ii) that while there is no direct proof that Peary Goar died in consequence of the assault there is a good deal of evidence that he died of natural causes, the evidence of the widow being to that effect; (iii), that there is neither proof nor finding that an extradition offence has been committed; and (iv) that the evidence, if believed, at best makes out a case of grievous if not of simple hurt only. The learned Judge further points out that, although under the Indian Extradition Act any form of hurt is an extradition offence, this case, by virtue of section 18 of the Act, is governed by the treaties between the British Government and the Government of Nepal, and does not disclose any offence for which an extradition order can be passed.

The learned Deputy Legal Remembrancer on behalf of the Crown argues that regard being had to the provisions of section 15 of the Indian Extradition Act, it is the Government of India or the Local Government alone and not the High Court that have the power to discharge the person for whose arrest a warrant has been issued under the Act. In this connection it is necessary to examine the provision of the law under which the Magistrate has purported to act. It is frankly admitted on behalf of the Crown that section 7 of the Act is not the Magistrate's authority for his proceedings, but it is urged that his action is covered by the provisions of section 10 of the Act.

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The portions of that section material to this case are contained in sub-sections (1) and (2) that run thus:—  
 “(1) If it appears to any Magistrate of the first-class or any Magistrate empowered by the Local Government in this behalf that a person within the local limits of his jurisdiction is accused or suspected of having committed an offence in any State, not being a Foreign State, and that such person may lawfully be surrendered to such State, or that a warrant may be issued for his arrest under section 7, the Magistrate may, if he thinks fit, issue a warrant for the arrest of such person on such information or complaint and on such evidence as would, in his opinion, justify the issue of a warrant if the offence had been committed within the local limits of his jurisdiction.” “(2) The Magistrate shall forthwith report the issue of a warrant under this section, if the offence appears or is alleged to have been committed in the territories of a State for which there is a Political Agent, to such Political Agent, and in other cases to the Local Government.”

Bearing the above provisions of the law in mind, the order of the Magistrate is open to attack on several grounds. *First*, he issued the warrant, at least in the case of Gulli Sahu, on mere information without any evidence; *secondly*, he has not reported the issue of the warrants to the Political Agent, there being one in Nepal; *thirdly*, he has made an enquiry into the case without a warrant or warrants issued by the Political Agent in or for the Nepal State; *fourthly*, he has ordered the surrender of the accused on a procedure not known to the Extradition Act.

It is true that section 15 of the Act ousts the jurisdiction of this Court to enquire into the propriety of a warrant issued under Chapter III, but where the order of the Magistrate is sought to be justified under an authority supposed to be derived from the law, but

is in fact without jurisdiction, not being sanctioned by it, we cannot but assume that the Magistrate has acted in his general jurisdiction, and as such his order is revisable by this Court and liable to be set aside at the instance of the party whose liberty is affected by it.

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In the view we have taken of the law in this case, we are supported by similar views expressed by the learned Judges of the Bombay High Court and the Punjab Chief Court respectively in the cases of *Emperor v. Huseinally Niazally* (1) and *In the matter of Ahadyer* (2).

Before concluding this judgment, we desire to quote the following passage from the judgment of the Privy Council delivered by the Lord Justice Mellish in *Attorney-General for Hong Kong v. Kwok-a-Sing* (3) which Magistrates, dealing with such cases, may profitably bear in mind:—"Suppose that a subject of China kills an Englishman within English territory, or on board an English ship, under circumstances which, according to English law, might amount to manslaughter only, could it possibly be right for the English Government to surrender such a person to the Chinese Government to be tried according to Chinese law, to which the distinction between murder and manslaughter may be wholly unknown."

We accept the Reference of the learned Judge made to us for the reasons indicated in this order, and we direct that the accused be discharged.

E. H. M.

*Accused discharged.*

(1) (1905) 7 Bom. Law Rep. 463, 467.

(2) (1886) Punj. Rec. 45, 52.

(3) (1873) L.R. 5 P. C. 179 199.