

reference in the case of those persons in respect of whom the Judge declines to accept the verdict. When the Judge agrees with the Jury in respect of any particular accused, the Judge ought to convict and sentence, or acquit that accused as the case may be.

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CRIMINAL REVISION.

Before Jenkins C.J., and Twinn J.

GULLI SAHU

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Nov. 20.

Revision—Extradition warrant issued by Resident in Nepal—Proceedings thereon by District Magistrate in British India, and order of surrender of fugitive—Power of High Court to interfere in revision, with such order—Nepal, whether a "Foreign State"—Criminal Procedure Code (Act V of 1898) ss. 435, 439, 491—Extradition Act (XV of 1903) ss. 7, 15.

Nepal is not a "Foreign State" within the meaning of the Indian Extradition Act (XV of 1903).

Where a warrant has been issued by the Political Agent, under s. 7 of the Act, its execution by the District Magistrate in British India, in accordance with the Act, is an executive act, and the High Court cannot interfere in revision with the proceedings of the Magistrate and the order to surrender the fugitive criminal, but if the latter considers himself aggrieved thereby, he can invoke the action of the Government under s. 15.

The power of the High Court, however, to interfere under s. 491 of the Criminal Procedure Code, which applies whatever be the occasion of the deprivation of the liberty of the subject, remains untouched by the Extradition Act.

Criminal Revision No. 1701 of 1914, against the order of A. H. Vercede, District Magistrate of Darbhanga, dated July 19, 1914.

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THE preliminary facts of the case are set forth in *Gulli Sahu v. Emperor* (1).

After the order of the High Court discharging the petitioner he was released. It appeared that, on the 24th June 1913, the Resident in Nepal issued a warrant addressed to the District Magistrate of Darbhanga, apparently under s. 7 of the Extradition Act, for the arrest of the petitioner, who was described as a Nepalese subject, and for his delivery to an officer of the State of Nepal, and forwarded evidence of his nationality and criminality. On the 5th July 1914, Mr. Slater, the Subdivisional Officer of Madhubani, issued a warrant against the petitioner who was arrested and placed, the next day, before the Magistrate in charge at Darbhanga to whom he applied for copies of the warrant and other papers in the case, claiming to be a British Indian subject. On the 9th instant the District Magistrate directed him to quote the law he relied on and to produce his evidence, presumably on the 19th. After hearing arguments on his behalf the District Magistrate passed the following order :—

“The petitioner, Gulli Sahu, has been arrested in this district in execution of a warrant issued by the Resident in Nepal under section 7 of the Indian Extradition Act and dated 24th June 1913. The Resident describes him as a Nepalese subject accused of murder and has sent evidence of nationality and criminality in support of the warrant.

The petitioner protests against his surrender to Nepal on 4 grounds.

(i) That the evidence against him, even if accepted, does not establish a charge of murder or other extraditable offence against him.

The evidence against him goes to show that he and several others in cold blood assaulted one Peari Goala, and that Peari Goala died 7 days later in consequence of the assault. It is urged that this evidence, even if believed, would not make the case one of murder in the first degree within the meaning of section 302, Indian Penal Code, and that lesser degrees of murder so to speak are not contemplated by Article IV of the Treaty of 1855 and are not extraditable offences. I do not consider it my business to find whether the facts deposed to would constitute an offence under

section 302 of the Indian Penal Code or not. The Nepal authorities evidently take a serious view of the affair, as I gather that one of the assailants has been sentenced to death and another to transportation for life on the same evidence. I do not, however, consider it my business to find as to the meaning of "murder" in Article IV of the Treaty. It seems to me that the word "murder" must be construed in the wide sense to mean "killing" covering murder in lesser degrees

(ii) That the evidence against him is not worthy of belief. It is pointed out that no complaint was lodged till 9 months after Peari's death, and that the evidence is conflicting, some witnesses attributing Peari's death to asthma. I do not consider it my business to find on the question of the credibility of the witnesses, but I may say that my *prima facie* impression is that the case is a true one, and that enormous efforts have been made by the accused persons to suppress it extending even to bribing the deceased's widow.

In speaking about "the evidence" above I have considered both the evidence forwarded from Nepal and the evidence subsequently recorded by the Subdivisional Officer of Madhubani

(iii) That he is a British subject and not a Nepalese subject. The Nepal evidence proves that he was born at Khungarch in Nepal and is a Nepalese subject. This I accept as *prima facie* true. The so called rebutting evidence produced by the petitioner seems to me unworthy of credit.

(iv) That the warrant is issued by "the Resident" in Nepal, whereas section 7 of the Extradition Act speaks of the Political Agent. The warrant is, therefore, invalid. I do not consider it necessary to seriously discuss this argument.

It seems to me that *prima facie* the petitioner is a Nepalese subject who is charged with an extraditable offence and has been arrested on a warrant duly issued under section 7 of the Extradition Act, and that to pick holes in words or go behind the Nepal evidence and refuse to surrender the petitioner would be improper, and would rightly be regarded as an unfriendly act by the Nepal authorities. I, therefore, direct his surrender. As proved by the petitioner I further direct that this order be kept in abeyance for 15 days to allow of his moving the Local Government against it under section 15 of the Extradition Act."

The petitioner then moved the Sessions Judge of Darbhanga to refer the case to the High Court but the latter refused to do so, by his order dated the 8th September 1914, on the ground of want of jurisdiction, the warrant not having been shown to be plainly

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illegal. He, thereupon, obtained the présent Rule from the High Court.

Mr. Chakravarti (with him *Mr. K. N. Chaudhuri* and *Babu Rajendra Persad*), for the petitioner. Nepal is not a "Foreign State" (*vide* letter from Under-Secretary, Foreign Department). The Government of India say that extradition of fugitive criminals from Nepal is governed by the Treaties of 1855, 1866; and Chapter III of the Act (XV of 1903) applies to the case subject to the Treaties. The offence in this case is not murder but culpable homicide or grievous hurt and is not extraditable under Article 4 of the Treaty of 1855. The warrant issued by the Political Agent under section 7 must be with respect to an extraditable offence otherwise it is plainly illegal. The Magistrate must satisfy himself when he receives such warrant, that it is in respect of such an offence. [Refers to *Gulli Sahu v. Emperor* (1)].

[JENKINS C.J. Can we interfere in such matters at all?]

Mr. Chakravarti. Yes, this Court can interfere and has interfered: see *Gulli Sahu v. Emperor* (1), *Emperor v. Huseinally Niazally* (2).

Section 15 does not oust the jurisdiction of the High Court if the warrant is on the face of it illegal: see *Queen v. Wilson* (3).

The Deputy Legal Remembrancer (Mr. S. Ahmed), for the Crown. We contend that this Court has no jurisdiction to interfere with the order of the Magistrate. The Magistrate, when he receives a warrant from a Political Agent, is bound to act in pursuance of the warrant, and has, as an executive officer, simply to execute the warrant. He cannot go behind the warrant and enquire whether the warrant is legal or

(1) (1913) I. L. R. 41 Calc. 400. (2) (1905) 7 Bom. L. R. 463, 467.

(3) (1877) 3 Q. B. D. 42.

otherwise. His order under this section is an executive order.

The only remedy against the warrant of the Political Agent or the order of the Magistrate is by an appeal to the Government of India or the Local Government. The High Court in England cannot interfere with an order of this character passed by the Chief Magistrate at Bow Street [see *Queen v. Wilson* (1), *Queen v. Maurer* (2)] but may interfere on a writ of *habeas corpus* and not otherwise.

The High Court here may interfere under section 491, Criminal Procedure Code, whether proceedings are under Chapter II or III of the Act: *In the matter of Rudolf Stallmann* (3) at pp. 183, 184, 197, 199.

Section 15 of the Charter also does not apply: see *Rudolf Stallmann v. Emperor* (4), *In re Mohunt Deva Dass* (5).

The High Court did interfere in this very case, *Gulli Sahu v. Emperor* (6), because there was no warrant at all from the Political Agent, so that there was no authority for the Magistrate to arrest the accused. The case of *Emperor v. Huseinally Niazally* (7) is distinguishable. The Treaty of 1855 has no application to this case as no requisition was made by the Nepal Government but a warrant issued by the Political Agent.

The requirements of s. 7 of the Act have been complied with. The warrant was issued by the Resident in Nepal who is the Political Agent under s. 3 (40) of the General Clauses Act (X of 1897), and the offences disclosed by the evidence amount at least to culpable homicide or grievous hurt, which are

(1) (1877) 3 Q. B. D. 42.

(4) (1911) I. L. R. 38 Calc. 547.

(2) (1883) 10 Q. B. D. 513.

(5) (1898) I. L. R. 38 Calc. 550 n.

(3) (1911) I. L. R. 39 Calc. 164.

(6) (1913) I. L. R. 41 Calc. 400.

(7) (1905) 7 Bom. L. R. 463.

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extraditable under Sch. III of the Indian Extradition Act.

JENKINS C.J. AND TEUNON J. The applicant, Gulli Sahu, has obtained a Rule calling in question the legality of his arrest under the Indian Extradition Act of 1903. The Rule was granted with some hesitation for great doubt was felt as to the Court's jurisdiction to interfere in the exercise of its revisional powers. This doubt was well-founded. The powers of the Act were set in motion by the Political Agent in and for the State of Nepal who issued a warrant addressed to the District Magistrate of Darbhanga for the arrest of the applicant Gulli Sahu, and his delivery as in the warrant described.

The applicant is a Nepalese subject who had fled from Nepal to British territory. The case against him is that he has committed, or is supposed to have committed, murder and that is an extradition offence. The proceedings thus fell within section 7 of the Act. Subsection (1) empowers a Political Agent to issue a warrant addressed to a District Magistrate for the arrest of a person by whom an offence has been committed, or is supposed to have been committed. Subsection (2) provides that the warrant so issued shall be executed in the manner provided by the law for the time being in force with reference to the execution of warrants.

It has not been suggested that we should or could revise what was done by the Political Agent; but we have been asked to interfere with the proceedings of the District Magistrate in British India. But the District Magistrate's sole function was to execute the warrant and, notwithstanding his eccentric procedure and pronouncement, this in effect is what he has done. And as in so doing he performed in accordance with

his legal duty an executive act, we have no power to interfere in the exercise of our revisional powers. That this is the true effect of the Indian Extradition Act, 1903, is we think apparent from an examination of its scheme. Chapter II of the Act deals with the surrender of fugitive criminals in the case of Foreign States, and where a requisition is made for such surrender, the Government may issue an order to a Magistrate to enquire into the crime. The method of inquiry is described, and a power to commit the fugitive criminal to prison to await the orders of the Government, or to release him on bail, is vested in the Magistrate.

Then it is enacted that the Magistrate shall report the result of his inquiry to the Government, and a power is given to the Government to refer to the High Court any important question of law. But it rests with the Government to decide as to the surrender of the fugitive criminal, and section 5 empowers the Government to stay proceedings under the Chapter and to direct any warrant issued under it to be cancelled, and the person for whose arrest a warrant has been issued to be discharged.

Chapter III, on the other hand, deals with the surrender of fugitive criminals in case of States other than Foreign States. Nepal is such a State, so that it is with this Chapter that we are concerned. In cases falling under this Chapter a simpler procedure is prescribed where proceedings are initiated by a Political Agent. In that case no enquiry is directed and the determination of the Political Agent is regarded as sufficient subject to the Government's power of interference under section 15.

Where, however, a State not being a Foreign State, itself makes a requisition for the surrender of an accused person then the procedure of section 3, which

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is in Chapter II, is prescribed including the enquiry and report by the Magistrate. An examination of the whole Act and a comparison of its provisions confirm the view that, where a warrant is issued by a Political Agent under section 7, its execution by the District Magistrate in accordance with the Act is an executive act, and the Court cannot interfere in revision with such execution. There is nothing in this view which in any way conflicts with the power of the Court to interfere otherwise than by way of revision. Thus the power of the Court to interfere under section 491 is untouched by this decision, for that is a power not created by the Extradition Act or exercisable by way of revision, but vested in Presidency Courts to protect the liberty of the subject in appropriate cases, whatever may be the occasion of the deprivation of which complaint is made.

If a fugitive criminal arrested under section 7 of the Indian Extradition Act considers himself aggrieved, he can invoke the action of the Government under section 15. This Court, however, has no power of revision and so the Rule must be discharged.

E. H. M.

Rule discharged.