APPELLATE CRIMINAL.

Before Rankin C. J. and Costello J.

SUDHEENDRAKUMAR RAY

v.

EMPEROR.*

1932

Dec. 8, 9

Jurisdiction—Terrorist crime—Jurisdiction of special magistrate to try case which was on trial before ordinary court after promulgation of Ordinance—Bengal Emergency Powers Ordinance (XI of 1931), ss. 30, 34.

A direction by the Local Government under section 30 of the Bengal Emergency Powers Ordinance (XI of 1931) confers jurisdiction on a special magistrate in all cases except those that were being actually tried on the date of the promulgation of the Ordinance.

Section 30 of the Ordinance authorises the Local Government in all cases except in the cases excluded by the opening words of section 34 to make a direction for trial by special magistrate of any one deemed to have committed a scheduled offence.

The saving in section 34 of the Ordinance is limited to cases, the trial of which was in progress on the date of the promulgation of the Ordinance, and does not apply to cases, the trial of which commenced before ordinary courts after the Ordinance had been passed.

APPEAL by Sudheendrakumar Ray and another.

The facts of the case and arguments are stated in the judgment.

Santoshkumar Basu, Radhikaranjan Guha and *Ramendrachandra Ray* for the appellants.

The Deputy Legal Remembrancer, Khundkar for the Crown.

RANKIN C.J. In this case, the two appellants before us were put on their trial before a special magistrate appointed under Ordinance XI of 1931 on charges under section 307, Indian Penal Code, and clause (*e*) of section 19 of the Indian Arms Act. The case against the two accused is this: On the 13th of

*Criminal Appeal, No. 439 of 1932, against the order of A. G. Allison, Addl. District Magistrate and Special Magistrate at Camp Jamalpur, dated May 19, 1932.

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October, 1930, at a certain ferry *ghât* in Jamalpur, the complainant, with another constable, saw four men getting into a boat. They went down there and endeavoured to follow them. Thereupon, the four men went up. Each of the two accused was among those four and each of them, when he got to the top of the ferry *ghât* and saw that they were being followed by the complainant and his companion, fired a revolver—one shot each from the top of the ferry *ghât* at their pursuers. The other two men ran away and these two men ran off after firing and were followed. They again fired, in the course of the chase, and the firing is said to have been made by putting their hands behind them—whatever it may mean. It appears also that the complainant had a revolver and fired some shots. No bullets were, however, found and nobody was hit. The magistrate came to the conclusion that both the charges had been proved against both the accused and he convicted them and sentenced each of them to four years' rigorous imprisonment under section 307, Indian Penal Code, and to a further year's rigorous imprisonment under section 19 (*e*) of the Indian Arms Act.

On this appeal, Mr. S. K. Basu for both the appellants has contended before us, first, that there is an objection to the jurisdiction of the trying magistrate and, secondly, that the identification of the two accused before us as the persons who had fired is unsatisfactory. He has taken a third point also to the effect that, if the evidence against the accused is believed, the elements necessary to make out an offence under section 307, Indian Penal Code, are not sufficiently proved.

We have, first of all, to examine the objection as to jurisdiction. The form in which that objection was first taken before us was this: By section 34 of Ordinance XI of 1931, it is provided that:

> No direction shall be made under section 30 for the trial of any person by a special magistrate, for an offence for which he was being tried at the promulgation of this Ordinance before any court.

The date of the promulgation of this Ordinance was the last day of November, 1931. It was said by Mr. S. K. Basu that in this case the accused were arrested on the 14th of November, 1930, that they were put before a magistrate and the usual enquiry had and that it resulted in their commitment to the sessions on the 11th July, 1931. Thereafter, certain bail applications were made and rejected by the sessions judge. On the 19th September, 1931, the case was transferred to the 4th Additional Sessions Judge and, in November, a certain application for classification, having been made to this learned judge and having been rejected, the case came on before him for trial on the 18th of January, 1932. The accused were called upon to plead and they pleaded not guilty. The learned sessions judge began empanelling the jurors, but, owing to certain challenges having exhausted the number of jurors present, the jurors were not able to be empanelled on that date. Consequently, the hearing was adjourned till the 1st March, 1932. On the 28th of April, 1932, the direction of the Local Government was made purporting to be under section 30 of Ordinance XI of 1931. In these circumstances, Mr. Basu contended, first of all, that, although the case was not taken up by the sessions judge until the 18th of January, 1932 for trial under section 271 of the Criminal Procedure Code, nevertheless the phrase in section 34 of the Ordinance "for which he was being "tried" was a phrase which would include the commitment proceedings—the stage of enquiry prior to the commitment and, therefore, this case could be brought directly within the opening words of section 34. I am of opinion that it is reasonably clear that the commitment stage is not included by the phrase "for which he was being tried at the "promulgation of this Ordinance". The trial had not begun until after the order of commitment had been made, the sessions court not having seisin of the case. In my judgment, that point in that form cannot be made good.

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The second—and I think the more fundamental form of objection as to the jurisdiction is this: It is said that, in any event, on the 18th of January, 1932, the accused were being tried when they were called upon to plead and their plea was recorded. The mere fact that the case had to be adjourned in order that the jury might be empanelled was an accident which does not entitle any one to say that the trial had not commenced. The sessions judge had commenced the proceedings by taking the steps indicated by section 271, Criminal Procedure Code. That being so, the argument is that there was no power under the Ordinance to direct a trial by a special magistrate, if at the time of that direction the accused persons were already on trial for the same offence. We have to consider carefully the meaning and effect of sections 30 and 34 of this Ordinance. It will be observed that, if section 30 be taken by itself, in a case where the Local Government is of opinion that there are reasonable grounds before them to think that certain persons have committed a scheduled offence or an offence punishable under the Ordinance the section says that it "may, by order in writing, "direct that such person shall be tried by a special "magistrate". So far, no attention seems to be paid to the circumstance that the accused may already be on trial or that any enquiry may be in progress in connection with the same offence. The matter is put simply as if the Local Government has come to a certain conclusion and directs a trial to be held by a special magistrate for a particular offence. When we come to section 34, we see that the saving for persons who are already on their trial is a saving confined to those persons who were being tried on the date of the promulgation of the Ordinance and this provision has a marked negative value and would not seem to put such persons on the same footing as persons who later on were on trial before an ordinary court at the time when the direction of the Local Government was made. If we carefully study section

34, we find that, having a direction that the existing trials are not to be interfered with,—by existing trials I mean the trials that were in progress on the date of the promulgation of the Ordinance—the section goes on to say that "save as aforesaid, a "direction under either of the said sections may be "made in respect of any person accused of a "scheduled offence". If, therefore, it is legitimate to stop there, it would seem that that provision authorizes such direction except in the cases excluded by the opening words of the section. But the concluding phrase of the section "whether such offence "was committed before or after the promulgation "of this Ordinance" trenches upon a different matter. That is intended to make it clear that the date of the offence has nothing to do with the applicability of the present procedure. It is contended by Mr. Basu that the main feature and purpose of section 34 is to make it clear that an offence, although committed before the promulgation of this Ordinance, may be dealt with by the special procedure. Mr. Basu suggests that, as the Local Government, prior to the promulgation of the Ordinance, would have had no opportunity of considering whether a special procedure was desirable or not, it might have been contended consistently with the general idea that no existing trial was at any time to be disturbed, that there was a special reason for disturbing an existing trial if it was in progress on the date of the promulgation of the Ordinance and that the opening words of section 34 are intended *ex abundanti cautela* to negative such contention. For this reason he says that we are not to draw any inference from the opening words to the effect that trials which were not in existence at the promulgation of the Ordinance were not to be interfered with. It seems to me that that is a very difficult construction to put upon section 34. If we consider the course of legislation leading up to this section, Mr. Basu's view becomes even more difficult to maintain. By the Criminal Law

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Amendment Act XIV of 1908, section 2, a scheme was provided, by which certain offences were to be tried before a special bench of the High Court and the procedure was that, where the magistrate had taken cognizance of any offence specified in the schedule, the Local Government could make an order which would attract the special provisions of the Act. By sub-section (*2*), it was provided that—

> No order shall be made in any case in which an order of commitment to the High Court or court of session has been made under the Code of Criminal Procedure, 1898; but, save as aforesaid, an order may be made in respect of any offence whether committed before or after commencement of this Act.

That appears to be the original of the provision which was afterwards repeated in the Ordinance of 1931. Under the Act of 1908, the making of an order of commitment, whether to the High Court or to the court of session, was to put an end to the power of the Local Government to apply the special procedure and we know that the procedure was to be applied in cases where the magistrate had taken cognizance of the offence. It would seem, therefore, that, unless there was an order of commitment, that provision would apply even although the trial before the magistrate was proceeding. The next time this provision was made was by the Bengal Criminal Law Amendment Act of 1925, which was made by the Governor of Bengal under the special power conferred by section 72, clause (*E*) of the Government of India Act. There, by section 3, it was provided:

> (1) The Local Government may, by order in writing, direct that any person accused of any offence specified in the first schedule shall be tried by Commissioners appointed under this Act and
>
> (2) No order under sub-section (*1*) shall be made in respect of or be deemed to include any person who has been committed under the Code for trial before a High Court, but save as aforesaid an order under the sub-section may be made in respect of or may include any person accused of any offence specified in the first schedule, whether such offence was committed before or after the commencement of this Act.

It is clear enough, therefore, that the making of an order of commitment to the sessions was not enough to prevent the Local Government under this Act from

applying the special procedure, though an order of commitment for trial before the High Court would of itself bar the application of the special procedure. The reason no doubt was that it was not thought that the competency of the local legislature would extend to an interference with cases pending before the High Court. The Ordinance, with which we are now concerned, however, is an ordinance made by the Governor-General exercising powers which are identical with those of the central legislature. It has not, therefore, been thought necessary to make any discrimination between trials at the sessions and trials before the High Court on commitment and the saving which is made by section 34 is confined to trials that were in progress on the date of the promulgation of the Ordinance. But with that exception it is said that a direction may be made in respect of any person accused of any scheduled offence. It seems to me impossible, therefore, to say that trials which were begun after the Ordinance had been passed were put in the same position as the trials mentioned in the opening language of section 34. There would be no point in making a special exception for the trials proceeding at the time of the promulgation of this Ordinance, if no trial once commenced could be interfered with by the operation of any order made under section 30. The Bengal Suppression of Terrorist Outrages Act (XII of 1932) repeats in its 29th section the same language as section 34 of Ordinance XI of 1931, which is now before us. It is indeed a very large power that is given to the Local Government in this way. If an order is to have the operation of bringing to an end a trial that is already in progress, no doubt such a power as that would be readily liable to the greatest abuse. On the other hand, so far as trials before a magistrate are concerned, I think it was early found necessary to eliminate altogether the idea that the special procedure is inapplicable whenever the trial before the magistrate has begun. It is very difficult to say

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at what stage—apart from the very earliest stage—trial does begin before a magistrate. There is some ground for arguing that the moment the magistrate takes cognizance of the offence the trial commences. On the other hand, people may argue that, in a warrant case, not until the charge is framed, can the trial be said to have begun. It has to be remembered that, in many proceedings before a magistrate, the position is that the magistrate makes up his mind at a late stage either to deal with the case himself or to make an order of commitment [section 347, Criminal Procedure Code]. When he does, in fact, make an order of commitment, then of course, the magisterial proceedings are mere enquiry. He does not know, in many cases, until towards the end, whether the order is to be made or not; and I think it has been found impossible to exercise the power of applying the special procedure under a limitation of that power—never to interfere with an existing trial. As each of the enactments, to which I have referred, namely, of 1908, 1925 and 1931, have been made, the liberty given to the Local Government seems to have been made wider and when finally, in section 34 of Ordinance XI of 1931, we find an express saving for those trials which were in existence on the 30th November, 1931, I do not think it possible as a matter of construction to say that an order under section 30 is bad, merely because it interferes with a trial begun subsequent to the 30th of November, 1931. I think were it necessary to decide the matter that the correct way of applying the phrase "for which he was being "tried" would be to ask oneself whether the proceedings indicated by section 271 of the Criminal Procedure Code had been commenced or not. But, in the present case, the order of the Local Government was made before the trial in the narrower sense had commenced, that is to say, the jury had not been empanelled, the prosecution case had not been opened and no evidence had been taken. This second form of objection to the jurisdiction fails and should be overruled.

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On the facts, I am of opinion that the special magistrate's judgment should be confirmed. He points out that the evidence of identification is given by no less than four persons and he points out that this has been corroborated and amply corroborated by the circumstance that the complainant mentioned the names of both the accused as his assailants immediately after the occurrence. I have no doubt, therefore, that, on the question of identification, the special magistrate's judgment is correct.

Upon the question whether it is sufficiently proved that all the elements of section 307, Indian Penal Code, are present in this case, I think there is no difficulty. Certain persons are clearly in fear of being apprehended by the police. When they find that they are being followed, they turn round and fire at the constables. In these circumstances, it is a very great strain on one's imagination to suppose that they were using revolvers loaded with blank cartridges when there is no evidence to indicate that they were so doing. The circumstance that they did not succeed in hitting anybody is no reason for supposing that the cartridges were blank. The question whether there was any smoke or not is not material for the purpose of the present question. We have it that the persons turned round and deliberately fired, though they did not hit anybody. That is no reason for supposing that they were not attempting to hit. It is much more likely that they wanted to hit. I am not impressed by the argument that because the bullets have not been found we ought to assume that no case has been made out under section 307, Indian Penal Code.

As regards the sentences, I regard them to be light and I see no reason to interfere with them.

This appeal, therefore, must be dismissed.

COSTELLO J. I am of the same opinion.

Appeal dismissed.

A. A.