

CRIMINAL REVISION.

Before S. K. Ghose and Henderson JJ.

SANTABIR LAMA .

v.

EMPEROR.*

1934

Nov.
23, 26.

Extradition—Arrest without a formal warrant, if legal—Indian Extradition Act (XV of 1903), ss. 7, 9, 10, 23.

The provisions of the Indian Extradition Act are meant to ensure that the arrest and detention of the persons, who are alleged to have committed an offence outside British territory, should be in accordance with a certain procedure and the sections of the Act with reference to such procedure should be continued strictly in favour of the subject.

When there is neither a warrant under section 7 nor a requisition under section 9 of the Indian Extradition Act, the magistrate is empowered to issue a warrant under section 10. It is an essential ingredient of this procedure that there should be a warrant. An arrest without such warrant is illegal.

Section 23 of the Indian Extradition Act refers to the cases of persons arrested under section 54, clause *seventhly*, of the Code of Criminal Procedure and is intended to cover those cases where the police officer arrests not only without a warrant but also without an order from a magistrate and acts on his own responsibility, on suspicion or information as based on facts which the police officer has considered for himself.

In the matter of *Charu Chandra Mazumdar* (1) referred to.

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The material facts and arguments appear from the judgment.

S. K. Sen and *Deeneshchandra Ray* for petitioner No. 1.

Moore and *Haridas Gupta* for petitioner No. 2.
Prabodhchandra Chatterji for the Crown.

GHOSE J. The two petitioners have filed an application under section 491, Criminal Procedure Code, and obtained a Rule in their favour in terms of a writ of *Habeas Corpus* upon the authorities concerned to show cause why the petitioners should not be set at liberty. It appears that there is an allegation that these two petitioners, together with

*Criminal Revision, No. 1064 of 1934, against the order of J. Younie, Sessions Judge of Darjeeling, dated Oct. 6, 1934, affirming the order of A. McD. Clark, Deputy Commissioner of Darjeeling, dated Sep. 29, 1934.

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three others, forcibly seized, within British territory, a sepy of Pashupatinagar Court of Nepal territory, took him into Nepal territory, and there assaulted him and took away some money and certain letters which he was carrying. On the 2nd September, 1934, an information was lodged at Sukiapokra *tháná* in British territory of an offence under section 341, Indian Penal Code, but in this matter a final report "true" was submitted for lack of evidence. Subsequently, the Lieutenant *Hákím* of Illam Amin, a court in Nepal territory, addressed letter No. 16 and bearing the date the 16th August, 1934, to the Deputy Commissioner of Darjeeling to the effect that the five accused persons, including the present two petitioners, had come into Nepal territory, and assaulted and robbed the aforesaid sepy. The *Hákím* requested that the men should be arrested and put in jail pending action for their surrender. It also appears that the sepy was brought to Victoria Hospital, Darjeeling, where he made a statement on the 8th August, which was recorded by a Sub-Inspector and that the man died on the 28th August. Subsequently, another letter bearing the date 19th September, 1934, was received from the Lieutenant *Hákím* of Illam Court, intimating to the Deputy Commissioner that the accused were charged with robbery and murder. The Deputy Commissioner ordered the police on the 27th August to arrest the accused, and, in pursuance of this order, the present two petitioners were arrested in Calcutta on the 17th September. They were produced before the Darjeeling court on the 19th September and then remanded to jail custody. Their application for release was rejected by the magistrate by his order dated the 29th September. In the course of that order the learned Deputy Commissioner stated that he "as Deputy Commissioner ordered the police to "arrest the accused on the 27th August, 1934, and his "instructions were carried out". He considered that the action taken by him was "of a purely executive "nature under section 10 and section 23 of the Indian

“Extradition Act”, and that he was “definitely “debarred from allowing bail”. He also doubted if the prisoners need be produced after fortnightly intervals, but he directed that the papers should be put up before him after such intervals or on receipt of the necessary requisition from the authorities of Nepal. It does not appear if the fact of the arrest was reported to the Nepal court. A motion was taken before the learned Sessions Judge of Darjeeling and he, in the course of an order bearing the date the 6th October, pointed out that the learned Deputy Commissioner, if he had purported to act under section 10 of the Indian Extradition Act, should have issued a warrant as contemplated in clause (1) and that he had overlooked the provisions of clause (4) with regard to the granting of bail. But on the merits the learned judge held that no case had been made out for the release of the prisoners on bail. Thereupon, the present petition was filed in this Court and on the 10th October, 1934, the present Rule was issued as mentioned above. In showing cause against the Rule, the learned Deputy Commissioner of Darjeeling wrote to say that he had moved the Legal Remembrancer to take steps to represent the Crown and to show cause why the prisoners should not be set at liberty. I am constrained to mention that it would have been much better if the learned Deputy Commissioner had followed the rule prescribed by this Court and furnished a proper explanation, stating the facts and the grounds on which he relied, so that the petitioners could have the opportunity of examining them.

The contention on behalf of the petitioners and upon which the present Rule was issued is to the effect that the arrest and detention of the petitioners are not in accordance with law and in particular with the provisions of the Indian Extradition Act—Act XV of 1903. The question whether the petitioners are British Indian or Nepalese subjects is of no importance. The provisions of the Indian Extradition Act are meant to ensure that the arrest and

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detention of persons, who are alleged to have committed an offence outside British territory, should be in accordance with a certain procedure, and it has been held that the sections of the Act with reference to that procedure should be construed strictly in favour of the subject. Chapter III describes how the surrender of fugitive criminals in case of States other than Foreign States is to be effected. When a warrant has been received in respect of an extradition offence, the procedure should be as under section 7. When a requisition is received in respect of any offence, the procedure should be as under section 9. But when neither a warrant nor a requisition has been received, the magistrate is empowered to issue a warrant under section 10. It is an essential ingredient of this procedure that there should be a warrant, because the provision is that the issue of the warrant is to be reported forthwith and there is a time limit of two months for the detention of the persons arrested. In the present case the procedure was clearly not under section 10. But it is contended that it is covered by section 23. This argument cannot be supported, because that section refers to the case of persons arrested under section 54, clause *seventhly*, of the Code of Criminal Procedure, that is to say, when a person has been arrested, not only without a warrant but also without an order from a magistrate. Section 54 is intended to cover those cases where the police officer acts on his own responsibility, that is to say, on suspicion or information as based on facts which the police officer has considered for himself. This was pointed out by Chaudhuri J. in the case of *In the matter of Charu Chandra Mazumdar* (1) and indeed it is apparent from the terms of section 54 itself. On the other hand, where the arrest is made in pursuance of an order of a magistrate, it is that order which must determine the legality or otherwise of the arrest. Mr. Chatterji for the Crown has contended that, merely because the magistrate has given an order,

the case is not taken out of section 54, where the police officer himself has received credible information or has conceived a reasonable suspicion. But this does not seem to be the case here. The learned magistrate, in his order of the 29th September, expressly says that he as Deputy Commissioner ordered the police to arrest the accused on the 27th August and that he considered that the action taken by him was of a purely executive nature. Mr. Chatterji has drawn our attention to a copy of an application filed by one Syed Hossain on the 18th September, 1934, but we are not satisfied that the police in this case effected the arrest on any thing except the order of the Deputy Commissioner. Nor does it appear that, even if the arrest were by the police on their own responsibility, the latter provision in section 23 of the Indian Extradition Act was followed and the detention of the prisoner was made subject to the restrictions as under section 10 of the Act. In these circumstances, it seems to us that the arrest and the detention of petitioners were not in accordance with the provisions of the Extradition Act, and therefore we must direct that the prisoners be released.

It has been brought to our notice by Mr. Chatterji that subsequent to the issue of this Rule, a warrant was received by the Deputy Commissioner on the 13th October, 1934, and another warrant was received by the Chief Presidency Magistrate on the 24th October, 1934. We understand that neither of these warrants has yet been executed. It is open to the magistrate to take action with reference to section 7 and to the subsequent sections, including section 18 of the Act and the treaty provisions relating to the surrender of prisoners. In so far as the present proceedings, on which the Rule is based, are concerned, we direct that the petitioners be released.

HENDERSON J. I agree.

Rule absolute.

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