## ORIGINAL CRIMINAL.

*Before Derbyshire C. J. and Costello J.*

1935

*Aug.* 28, 29.

KURT KRUG

*v.*

ADVOCATE-GENERAL.*

*Certificate of Advocate-General—Criminal trial by High Court—Rule on Advocate-General for grant of certificate, if competent—Letters Patent, 1865, cl. 26.*

Where a sentence has been passed in a trial by the High Court in its Original Criminal Jurisdiction, and the Advocate-General after a careful consideration of the matter refuses to grant a certificate under cl. 26 of the Letters Patent, no Rule can issue calling upon him to show cause why he should not grant the certificate.

APPLICATION, *ex parte*, for a Rule on the Advocate-General to show cause why he should not certify that there was an error in the decision of a point of law decided by the High Court Sessions Judge so that the decision might be reviewed by the High Court.

The facts of the case and argument of counsel appear sufficiently from the judgment.

*Barwell* and *Jyoti P. Mitter* for the applicants.

*Cur. adv. vult.*

DERBYSHIRE C. J. In this matter the petitioners are asking for a Rule *nisi* on the Advocate-General of Bengal to show cause why he should not grant a certificate under cl. 26 of the Letters Patent of 1865 so as to enable this Court to review the summing up of Henderson J. in the trial of the petitioners at the Calcutta Sessions on April 5, 1935, and also revise the judgment and sentences passed upon the petitioners upon grounds stated in the petition.

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The facts which give rise to this application are shortly these: On the 5th April of this year the two petitioners were convicted by a jury by a majority of 8 to 1 at the Sessions of this Court on a charge of being in unlawful possession of arms, contrary to the Indian Arms Act. They were thereupon sentenced by the learned Judge to 3 years' imprisonment. It is appropriate at this stage to consider what rights the petitioners have according to law. They are set out in the Letters Patent for this Court of 1865. Clause 23 reads as follows:—

And we do further ordain, that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Clause 25 reads:—

And we do further ordain that there shall be no appeal to the said High Court of Judicature at Fort William in Bengal from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

Clause 26 reads thus:—

And we do further ordain that, on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

There is, therefore, from a conviction of this kind, no right of appeal. But the Court may reserve a point or points of law for the opinion of the High Court. Henderson J. did not in this case, reserve any point or points of law for the opinion of the High Court. Then there is this provision in cl. 26 that:—

On its being certified by the Advocate-General that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case.

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Now it seems to me that it is, on the wording of cl. 26, a condition precedent to this Court dealing with the matter that there should have been a certificate by the Advocate-General that in his judgment there is an error in the decision of a point or points of law decided by the Court or that a point or points of law which has or have been decided by the said Court should be further considered before this Court can deal with the matter as is set out in the latter part of cl. 26, namely, determine such point or points of law and alter the sentence passed by the Court of the original jurisdiction and pass such judgment and sentence as to the High Court may seem right. Now, in this matter, the Advocate-General was asked to give a cretificate. We are told that the counsel who represented the two petitioners and the counsel who represented the Crown appeared before the Advocate-General, that an application was made to him to give a certificate and that the matter, out of which, it was alleged, the points arose which should cause the Advocate-General to give a certificate was discussed before him by both sides. Both sides were heard. On June 21, 1935, the Advocate-General wrote a letter to Mr. N. C. Mitra, the solicitor for the applicants, as follows:—

Sir,

Re. Application for a certificate under cl. 26 of the Letters Patent. And in the matter of the King Emperor *v.* Kurt Krug and Frederick Warnecke.

With reference to your application, dated the 22nd/24th May, 1935, I have to inform you that I have carefully considered the matter and I do not think this is a case in which I can grant a certificate asked for. The papers forwarded are returned herewith.

That was signed by the Advocate-General.

In my opinion, that determines the matter. His certificate is, according to my reading and understanding of cl. 26 of the Letters Patent, a condition precedent to this Court's dealing with the matter under that clause and that certificate has not been given. It has been argued that we should issue a Rule upon him to show cause why he should not give

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a certificate. In my view it is not within our province to do so. The certificate to be given is that in his judgment there is an error in the decision of a point or points of law. The Advocate-General, having considered the matter, heard both sides and exercised his judgment in the matter, in my view, it is not within our province to call upon him to show cause why he should not issue a certificate.

I am fortified in that conclusion by these circumstances: These Letters Patent are now 70 years old. There is not a single case reported which Mr. Barwell appearing for the petitioners could refer us to. There is not a single case, as far as this Court knows, where such an application as the present has been made and acceded to. There is no record that such an application has, in fact, been made. It seems to me highly probable that if it had been within the province of this Court to call upon the Advocate-General to show cause why he should not issue a certificate, after he had considered the matter and refused to grant the certificate, there would have been many such applications, which would certainly have been reported.

For those reasons, in my view, this application of the petitioners must fail.

COSTELLO J. This application is unique, so far as we can see, in the annals of this Court. It is indeed unprecedented in character. Mr. Barwell has conceded that no such application has ever before been made to this Court. In my opinion, the application is wholly misconceived, unwarranted and baseless in law. The jurisdiction of this Court in criminal matters is solely derived from the relevant clauses of the Letters Patent of 1865, and the basic feature of that jurisdiction is that there shall be no appeal to this Court from any sentence or order passed or made in any criminal trial before the Court in its ordinary criminal jurisdiction constituted by one or more Judges of this Court. The only method

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whereby a trial held by the Court of Sessions can be considered and reviewed by this Court is upon the conditions specified in the concluding sentence of cl. 25 of the Letters Patent and in cl. 26 of the Letters Patent. Putting those two provisions together the position is this: The High Court has only power and authority to review a criminal case where either the learned Judge who presided at the trial has himself reserved a point or points of law for the opinion of this Court or the Advocate-General has certified that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction or that a point or points of law which has or have been decided by that Court should be further considered. In the present instance, Henderson J. who presided over the trial at which the present applicants were convicted did not reserve any point or points of law for the opinion of this Court. But on May 24 of this year the convicted persons by their attorney applied to the Advocate-General for what is described as a *fiat* on certain grounds which have been set out in the petition which is now before us. Those grounds are summarised in para. 19 of the petition wherein it is stated "In the result your petitioners "contend that by reason of the aforesaid misdirections, "(i) the jury were bound to be misled, (ii) the appli- "cants' defence was never adequately placed before "them by the Judge and (iii) their individual rights "to a fair trial were lost to them. The applicants "accordingly submitted that in the circumstances they "were entitled to the *fiat* asked for". It is clear that in this case the learned Advocate-General considered the matter in a completely satisfactory and judicial manner. I am not at all sure that there is anything in the Letters Patent which requires the Advocate-General, for the purpose of coming to a decision as to whether or not he should grant a certificate under cl. 26, to hold what is tantamount to a judicial hearing of counsel for the convicted persons and counsel for the Crown. I think that it would be

quite sufficient to satisfy the requirements of cl. 26 if the learned Advocate-General himself considered the record of the proceedings and arrived at a decision without hearing either counsel for the convicted persons or counsel for the Crown. Whether that is so or not, it is certain that, in the present case, the learned Advocate-General did arrive at his decision after holding an enquiry and giving full opportunity to counsel for the convicted persons to say all that he desired to say on their behalf, and it was only after so doing that on or about June 21, 1935, the Advocate-General by letter dated June 21, 1935, refused to grant the certificate which had been asked for. The effect of that letter was this: that the learned Advocate-General stated that he was unable to certify that in his judgment there was an error in any decision of a point or points of law decided by Henderson J. at the trial of the present applicants. The present applicants therefore have entirely failed to comply with the condition precedent which is essential before they could ask this Court to review their case. It seems to me on the face of it illogical and indeed impossible to say that it would be open to this Court in any circumstances whatever, either by means of issuing a Rule or otherwise, to compel or even direct the Advocate-General to give a certificate which *ex hypothesi* would not represent his real and considered judgment in the matter. If the Advocate-General has said that he cannot grant a certificate, that, in his judgment, there is no error in the decision of a point or points of law, it would be, in my opinion, to enforce upon him what I can only describe as an act of intellectual dishonesty if the Court sought to compel him to say that in his judgment there was an error when he had already said that in his judgment there was no error. The cases cited by Mr. Barwell, *Queen Empress* v. *Shib Chunder Mitter* (1) and *King-Emperor* v. *Upendra Nath Das* (2), in my opinion, afford no support to his contention. It is true that in the first of these two cases a

(1) (1884) I. L. R. 10 Cal. 1079. (2) (1914) 19 C. W. N. 653.

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Rule was issued on the law officers of the Crown to show cause why the prisoner Shib Chunder should not be acquitted or why there should not be a new trial on the ground that the learned Judge (Field J.) who had tried him misdirected the jury on a point of law. But an examination of the report shows that although the Advocate-General had not certified that there was any error in the decision of a point or points of law, he had, in fact, stated that the matter ought to be further considered and it was only in those circumstances that the Court thought fit to have the matter brought up before it for a further consideration. In the second of the two cases I have mentioned the matter came up before a Full Bench on a certificate granted by the Advocate-General under cl. 26 of the Letters Patent and it was then held:—

> Where there is no misdirection or other error as certified by the Advocate-General under cl. 26 of the Letters Patent, his certificate is misconceived, and the High Court has no power to interfere. It is not within ts powers to reopen the case and express any opinion on the merits.

This latter case, therefore, indicates so far as it is at all relevant to the present application that this Court can only deal with the matter if the Advocate-General has definitely certified that in his judgment there is an error in the decision of a point or points of law.

There is one other matter in connection with this particular application with regard to which I desire to say a word or two. I have looked into the petition upon which this application is founded and have examined the allegations which are there set forth as constituting the reasons why the Advocate-General ought to have granted a certificate. In my opinion, to say the least of it, it is extremely doubtful whether by any stretch of language it can rightly be said that any one of them constituted a decision of a point of law decided by the Court who tried the present applicants. Whatever the merits of the matter may

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be, it is in my view clearly beyond all question whatsoever that the refusal by the Advocate-General to give a certificate is not a matter which can be called in question by any proceeding in this Court. The revisional jurisdiction of this Court in criminal matters is derived from cl. 28 of the Letters Patent, and it is limited to matters arising in the criminal Courts which are subject to the appellate jurisdiction of this Court.

As my Lord the Chief Justice has already pointed out, during the whole course of the seventy years which have elapsed since the coming into existence of the Letters Patent in the year 1865, no attempt has previously been made to obtain from this Court a Rule in circumstances where the Advocate-General has properly and carefully and judicially considered whether he would or would not grant a certificate and upon such consideration declined to do so.

The decision of the Advocate-General, in the circumstances, is final. His decision cannot be called in question by any proceeding in this Court.

I agree, therefore, that this application should be dismissed.

*Application dismissed.*

Attorney for applicants: *N. C. Mitra.*

P. K. D.