APPELLATE CRIMINAL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

1922, May 4

ERADA PADINHAREDIL GOVINDAN NAIR AND ANOTHER (ACCUSED), PETITIONERS.*

Government of India Act (5 *and* 6 *Geo.* 5, *ch.* 61), *sec.* 72—*Ordinance II of* 1921, *ss.* 7, 16—*Martial Law in "Administrative Areas"—Summary Court—Court held outside "Administrative Area"—Offence within such area—Whether Court properly constituted—Powers of interference by High Court—Power of High Court to issue writ of* Habeas Corpus *to mufassal.*

A "Summary Court" constituted under section 6 of Ordinance II of 1921 promulgated by the Governor-General under section 72 of the Government of India Act is not a properly constituted Court if it sits outside the "Administrative Area" within which Martial Law has been proclaimed to try offences committed within such area.

In such cases the High Court has power to interfere although by section 16 of the Ordinance all powers of interference with the decisions of "Summary Courts" appointed under the Ordinance has been prohibited.

Judgment of KUMARASWAMI SASTRI, J., *In re Kochunni Eluya Nayar*, (1922) I.L.R., 45 Mad., 14, approved.

The High Court having succeeded to the powers of the Supreme Court has the power to issue writs of *Habeas Corpus* outside the Presidency Towns.

Ameer Khan, In the matter of, (1870) 6 B.L.R., 392, and *In re Nataraja Iyer*, (1913) I.L.R., 36 Mad., 72, approved.

PETITION under section 107, Government of India Act, praying the High Court to issue a writ of *Habeas Corpus* to the Jailor, Camp Jail, Bellary, to bring the bodies of the accused to the High Court to ascertain the legality or otherwise of their detention.

The facts are set out in the Order.

K. P. M. Menon and *P. Govinda Menon* for petitioners.

The Public Prosecutor for the Crown.

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* Criminal Miscellaneous Petition No. 31 of 1922.

In re GOVINDAN NAIR.

The Court issued the following Writ :—

SCHWABE, C.J.

SCHWABE, C.J.—In this case we are of opinion that the writ of *Habeas Corpus* must go. The matter is urgent, and therefore we propose to direct the writ to go. The matter is also an important one, and it is desirable that our reasons should be put in writing and delivered in the form of a formal judgment hereafter. But, meanwhile the order of the Court will be that a writ do issue addressed to the Jailor, Bellary Camp Jail, to this effect :—

We command you that you have in the High Court of Judicature at Madras, immediately after the receipt of this our writ, the bodies of Erada Padinharedil Govindan Nair and Erada Padinharedil Raman Nair being taken and detained under your custody, as is said, together with the day and cause of their being taken detained by whatsoever names they may be called therein, to undergo and receive all and singular such matters and things as our said Court shall then and there consider of concerning them in this behalf, and have you there then this our writ.

Later the ORDER of their Lordships was delivered by

SCHWABE, C.J.

SCHWABE, C.J.—This is a petition for a writ of *Habeas Corpus* by two persons undergoing a sentence of 18 months for alleged participation in the Moplah rebellion. They were charged with rioting under section 147, Indian Penal Code, an offence cognizable by the ordinary Courts. It was alleged that they had assisted the rebels in destroying a bridge. This they admitted, but stated that they were compelled to do so under threat of death. They alleged, owing to the trial being summary and taking place away from the scene of action and far from their homes they were not in a position to substantiate this defence by evidence which they could have called

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if the trial had taken place under the ordinary law and in its proper place.

It is admitted that they were tried by a summary Magistrate appointed under Ordinance II of 1921 who held his Court at a place outside the area in which Martial Law was proclaimed, the alleged offence having been committed inside such area. Acting under the powers conferred by section 72 of the Government of India Act this Ordinance was made and promulgated by the Governor-General. By it Martial Law was put in force in certain areas called "Administration Areas," and by section 6 Summary Courts of criminal jurisdiction might be constituted in any administration area with summary powers of trial of certain minor offences connected with the rebellion. The Military Commander had power to direct cases to be tried by Summary Courts and to distribute the work among such Courts. By section 7 no Summary Court can try any offence unless committed in the administration area in which such Court is established. Except as so provided, the ordinary Criminal Courts continued their functions.

From the decision of such Summary Courts there is no appeal, and further by section 16 of the Ordinance all powers of interference with such decision by writ of *Habeas Corpus* or otherwise is prohibited. It follows that if the Court that tried the petitioners was a properly constituted Court under the Ordinance we have no power to interfere. But in our judgment this was not a Court properly constituted under the Ordinance, for we can find no right at all to hold a Summary Court except in the Martial Law area, and by the words of the Ordinance, the jurisdiction of these Courts is local. Outside the area the ordinary rules of law prevail, and there is nothing in the Ordinance to prevent this Court interfering with the decision of any Court outside the area

purporting to exercise a criminal jurisdiction which it does not possess. That this is the proper construction of the Ordinance seems to have been recognized by the Government of India after these convictions by section 10 of the Ordinance No. V of 1921 promulgated on November 11, 1921. By that section it was enacted

"Notwithstanding anything contained in any law for the time being in force, the local Government may, by general or special order, appoint places outside the area in which Martial Law is in force at which any Summary Court, constituted under the Martial Law Ordinance, 1921, or special Magistrate may sit for the trial of offences."

It follows that the conviction of the petitioners was illegal and that there is no jurisdiction for their detention in prison This view was also expressed by KUMARASWAMI SASTRI, J., *In re Kochunni Elaya Nair*(1), a case in which it was not necessary for the decision, but we think the law was correctly laid down by that learned Judge.

The question remains, and has been fully argued before us, whether this Court has any power to interfere by the issue of a writ of *Habeas Corpus* to the Jailor of the jail in this Presidency in which the petitioners are confined.

The law can be stated to be that in every part of the British Empire every person has a right to be protected from illegal imprisonment by the issue of the prerogative writ of *Habeas Corpus*. The King's Bench in England exercised the power of issuing such writs throughout the British Empire until the statute known as the Habeas Corpus Act, 25 and 26 Vic., C. 20, was passed. By that act the powers of the King's Bench are limited to England and such places outside England which have no local Court competent to exercise the

(1) (1922) I.L.R., 45 Mad, 14.

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power. It follows that these petitioners must have a right to such a writ, and it is a matter of absolute right, either from a Court in this country, if there be one competent to grant it, or from the Court of King's Bench sitting in London. In our judgment it is fully established that this Court has all necessary powers and is competent to grant the writ. That it has such or other similar powers in the Presidency Town of Madras is clear from section 491, Criminal Procedure Code. But that Code makes no provision for the exercise of that power in the mufassal. This Court has, however, succeeded under the High Courts of Judicature in India Act, 24 and 25 Vic., C. 104, and the Letters Patent issued thereunder to all the powers of the Supreme Court of Madras; and that Supreme Court had by its Charter of 1800, article 8, given to it the powers over

> "all the Territories which now are, or hereafter may be, subject to or dependent upon, the Government of Madras aforesaid; and to have such jurisdiction and authority as our justices of our Court of King's Bench have, and may lawfully exercise, within that part of Great Britain called England as far as circumstances will admit."

These words give to the Supreme Court the right usually exercised by the King's Bench in England of issuing the writ of *Habeas Corpus*.

This was definitely decided in the analogous Calcutta case of *Ameer Khan, In the matter of*(1), in the able and illuminating judgment of NORMAN, J., approved and followed in this Court in *In re Nataraja Ayer*(2).

It has been contended on behalf of the Crown by Mr. Adam in his very able argument that, as the Criminal Procedure Code in sections 491 and 456 makes provision for the exercise of similar powers in Madras and for the granting of such writs in the case of British subjects in

(1) (1870) 6 B.L.R., 392. (2) (1913) I.L.R., 36 Mad., 72

all parts of India, it must be taken to have been the intention of the legislature to confine the powers of this Court to such cases and that the power to issue the writ in the mufassal which had been established in *Ameer Khan, In the matter of*(1), must be taken to have been impliedly taken away. In our judgment this is not sound for three reasons. In the first place, section 491 merely substitutes or adds for the Presidency Towns a different form of procedure less cumbersome than the granting of the writ of *Habeas Corpus*; while section 456 was necessary because in certain parts of India there was no High Court established by Charter, and as there was no Court in this country which could grant a writ of *Habeas Corpus* even to a European British subject in these parts it was thought necessary to give that power, and such power was given by that section. Secondly, the right which had been established was a substantive right and it could hardly have been the intention of the legislature to take that right away by making rules of procedure or giving adjective rights for the exercise of similar powers. It is the sort of case where it can be fairly argued that if the legislature intended to take away such an important right from the subject it must use plain and unambiguous language. Thirdly, to adopt such a construction of the Criminal Procedure Code would lead to this absurdity, namely that a European unlawfully imprisoned would have the right to obtain the writ in this Court while an Indian subject would have to go to the King's Bench in London for his remedy; and there is a sound rule that where one possible construction leads to an absurdity and another does not, the latter is to be preferred.

In our judgment, this Court has the power to issue this writ and in this case it is its duty to do so.

(1) (1870) 6 B.L.R., 392.

In re GOVINDAN NAIR.

SCHWABE, C.J.

In obedience to the writ issued by this Court the prisoners having been brought before this Court, they are discharged.

M.H.H.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

1922, May 5.

K. V. MUNISAMY MUDALIAR (RESPONDENT), APPELLANT,

v.

RAJARATNAM PILLAI AND OTHERS (PETITIONERS), RESPONDENTS.*

Criminal Procedure Code (Act V of 1908), sec. 195 (b) and (c), sub-sections (6) and (7)—Sanction to prosecute for offences under ss. 193, 465, 467, 474 and 109, Indian Penal Code—Suit withdrawn on the original side, High Court—Document, not produced in suit - Produced under order of Court in sanction proceedings—Disclosure in affidavit, filing in Translator's office and allowing inspection, effect of—Actual production in suit, necessary—Prima facie case, not enough—Public interest—Prosecution, necessity for—Judicial discretion—Appeal—Criminal trial—Judgment—Letters Patent, clause (15), sub-sections (6) and (7) of sec. 195—Appeals ordinarily from original side to Division Bench, Appellate Side, High Court.

After the withdrawal of a suit on the original side of a High Court before trial, the learned Judge granted sanction for the prosecution of the plaintiff for offences under sections 193, 465, 467, 474 and 109 of the Indian Penal Code. It appeared that the document, in respect of which the offences were alleged to have been committed, was not produced in Court in the suit but was disclosed in an affidavit filed therein and inspection thereof allowed to the other side; that it was filed in the office of the Translator of the High Court

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* Original Side Appeal No. 25 of 1922.