

whom the Court may think to be material. The addition or the alteration of a charge does not open up the trial from the beginning and the Court may immediately proceed with the trial if it is of opinion that there will be no prejudice to the accused. In order to safeguard the interests of the parties section 231 gives them the right to recall or resubmit any witness. The recalling of the prosecution witnesses for further cross-examination in the present case by the accused was evidently under this section. Under section 227 the added or altered charge has to be read and explained to the accused. These safeguards appear to have been deemed sufficient to protect the interests of the prosecution or the accused in the case. The trial as already observed does not commence *de novo*, so that if the accused had been already called upon to enter on their defence there is no further obligation upon the Magistrate to examine the accused under section 342 of the Code. Therefore, the authorities on the subject of which we are so well cognisant do not at all apply to the present case. The contention is therefore overruled.

ADAMI, J.—I agree.

Sentences reduced.

REVISIONAL CRIMINAL.

Before Jwala Prasad and Ross, J.J.

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Extradition Act, 1903 (Act XV of 1903), sections 2, 7, 9, 10, 15 and 18 and Schedule III—Escaping from jail in Nepal—warrant issued by British Envoy to District Magistrate in British Territory for arrest of absconder, legality of—Power of High Court to interfere with action under illegal warrant.

Section 10 of the Indian Extradition Act, 1903, applies only if the warrant issued under section 7 is legal, but absconding

* Criminal Miscellaneous Revision No. 87 of 1921, against an order of F. G. Rowland, Esq., Sessions Judge of Muzaffarpur, dated the 6th September, 1921.

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from jail not being one of the offences mentioned in Schedule I of the Indian Extradition Act, 1903, a warrant for arrest on such a charge does not fail within section 7.

Although section 15 empowers the Government of India and the Local Government to stay proceedings taken under Chapter III of the Act and to direct any warrant to be cancelled and the accused person to be arrested, this does not oust the jurisdiction of the High Court to interfere in a case where action under the Act has not been taken under a valid warrant.

Rudolf Stallmann, in the matter of (1), and *Emperor v. Huseinally Niazally* (2), approved.

Section 9 applies only when a requisition has been made to the Government of India or to a Local Government and not when a warrant has been addressed to the District Magistrate.

Gulli Sahu v. Emperor (3), referred to.

The facts of the case material to this report were as follows :—

The accused person escaped from Birgunj Jail in Nepal, where he was confined on a charge of murder, and came within the jurisdiction of Bhaura Police Station in the Subdivision of Bettiah in British territory. On the 14th April, 1921, the *Hakim* of Birgunj wrote to the Subdivisional Officer of Bettiah requesting him to have the accused person arrested, and undertaking to forward evidence of nationality and guilt. The accused person was accordingly arrested. On the 31st May he was released on bail on the order of the Sessions Judge of Muzaffarpur. The evidence of nationality and guilt was received by the Subdivisional Officer of Bettiah on the 11th June. On the 2nd September the accused person was re-arrested on an extradition warrant issued under section 7 of the Indian Extradition Act, 1903, by the British Envoy to the Court of Nepal, dated the 1st August, and was remanded to *hajāt*. He again applied for bail and this was refused on the 3rd September. The Subdivisional

(1) (1912) I. L. R. 39 Cal. 164.

(2) (1905) 7 Bom. L. R. 463.

(3) (1914) I. L. R. 41 Cal. 400.

Officer then cancelled the order of the 2nd September and sent his report and finding to the District Magistrate to be forwarded to the higher authorities under section 3(3)(vi). The District Magistrate forwarded the papers to the Divisional Commissioner pointing out that the order of the Subdivisional Magistrate sending the case to him for reference to the higher authorities under section 3(3)(vi) was wrong, as well as his omission to report the detention of the accused person for more than two months. The District Magistrate thought that the case was governed by section 7, that the accused person was arrested under section 10, that the Subdivisional Magistrate was bound to execute the warrant and to forward the accused to the Nepal authorities as directed therein, and that the only course open to the accused person was to move the Local Government under section 64. The Commissioner agreed with the District Magistrate and returned the papers to him. The accused person moved the High Court.

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The matter came up for hearing before Jwala Prasad and Ross, J.J. on the 23rd November, 1921. Their Lordships heard counsel for the petitioner and requested the Government Advocate to appear. The latter appeared on the 2nd December.

S. P. Varma, for the petitioner.

Sultan Ahmed, Government Advocate, for the Crown.

JWALA PRASAD.—The case raises a very important question relating to the power of the High Court with respect to fugitive offenders. The petitioner was arrested in Nepal on a charge of abetment of murder and was put in Birgunj jail within the jurisdiction of Nepal Government. He, however, managed to escape from the jail and came to the neighbouring British territory in Bheriharwa within the jurisdiction of the Bhaura Police Station. The Sub-Inspector of Bhaura,

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on 12th April, 1921, reported the above fact to the Sub-divisional Officer of Bettiah requesting him to communicate with the *Hakim* of Birgunj and to pass an order for the arrest of the petitioner. On 14th April, the *Hakim* of Birgunj wrote to the Subdivisional Officer of Bettiah requesting him to have the petitioner arrested and promising to send the evidence of nationality and criminality to the Subdivisional Officer of Bettiah. Thereupon, under the orders of the Sub-divisional Officer, the petitioner was arrested on the 16th April, 1921, and was remanded to *hajat* till the 1st May 1921. He remained in jail till the 31st May 1921, when he was released on bail under the orders of the Sessions Judge of Muzaffarpur. On the 11th June 1921, the *Hakim* of Birgunj forwarded to the Sub-divisional Officer of Bettiah the evidence of nationality and criminality referred to in his letter of the 14th April, 1921. The British Envoy at the Court of Nepal sent the extradition warrant under section 7 of Act XV of 1903 (Indian Extradition Act), dated the 1st August, 1921, to the District Magistrate of Champaran, for the arrest and delivery of the petitioner to the Nepalese Officer of the Birgunj Amini Court. The petitioner was then arrested on the 2nd September, 1921, and was remanded to *hajat* pending arrangements for escort from the Nepal authorities.

His petition for bail having been rejected on the 3rd September 1921, the Subdivisional Officer cancelled his order of the 2nd September and sent his report and finding to the District Magistrate to be forwarded to the higher authorities under section 3(3), clause (6) of the Extradition Act. The District Magistrate forwarded the papers of the case to the Commissioner of the Tirhut Division, by his letter No. 8176, dated the 30th September, 1921, pointing out that the order of the Magistrate sending the case to the District Magistrate for reference to the higher authorities under section 3(3), clause (6), was wrong, as well as his omission to report the detention of the accused for

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more than two months. The District Magistrate thought that the case was governed by section 7 of the Extradition Act, that the accused was arrested under section 10 of the Act, that the Magistrate was bound to execute the warrant and to forward the petitioner to the Nepal authorities as directed therein, and that the petitioner's only course was to move the Local Government under section 54 of the Act. The Commissioner agreed with the District Magistrate and returned the papers to him with the result that the matter has not been referred to the Local Government and the petitioner is now in Bettiah jail to be forwarded to the Nepal authorities. In the meantime the petitioner came up to this Court with a petition challenging the jurisdiction of the Bettiah Magistrate to arrest him and detain him in the jail as stated above. A rule was accordingly issued by this Court upon the District Magistrate to show cause and the case has now come before us.

The warrant in execution of which the petitioner has been arrested is expressed to have been issued under section 7, Act XV of 1903, (The Indian Extradition Act), and is addressed to the District Magistrate of Champaran, Motihari. It runs as follows:—

"Whereas Jaipal Bhagat, being a Nepalese subject, accused of absconding from jail, has fled from Nepal to British Territory, and is at present in your jurisdiction, this warrant is to authorise you to arrest and deliver the above named person to the Nepalese Officer of the Birganj Amini Court at Birganj in Nepal."

Section 7 applies only to an "extradition offence." "Extradition offence" has been defined by section 2 of the Act to mean "any such offence as is described in the first schedule." Absconding from jail is not one of the offences mentioned in that schedule. Therefore section 7 has no application at all and the warrant in question issued by the British Envoy at the Court of Nepal for the arrest of the petitioner is without jurisdiction. The report of the District Magistrate to the Commissioner, referred to above, shows that the petitioner was arrested under the provisions of section 10 of the Code; but that section could only apply if the

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warrant under section 7 was legal, but, as shown above, the warrant was wholly illegal and without jurisdiction. Therefore the arrest of the petitioner also was without any authority. No doubt section 15 of the Act empowers the Government of India and the Local Government to stay any proceedings taken under Chapter III of the Act and to direct any warrant to be cancelled and the person arrested to be discharged. But that does not necessarily oust the jurisdiction of this Court to interfere in a case where the action under the Act has not been taken under a valid warrant.

In the matter of *Rudolf Stallmann*⁽¹⁾ it was pointed out that the section does not take away the power of the Court to issue *habeas corpus* or directions in the nature of that writ inasmuch as that neither that section nor any other provision of the Act has expressly taken away the power of the Court with respect to *habeas corpus*. Similar was the view expressed in the case of *Emperor v. Huseinally Niazally*⁽²⁾. At page 467, Russell, J. observed as follows: "As was pointed out by Mr. *Branston* in his argument there was some difficulty in ascertaining what the accused really were praying for; but Mr. *Davar* in his reply put it thus, 'This Court can order the District Magistrate to hold his hand until the warrant is shown to be legal.' The objection to this, however, is that by section 15 of the Extradition Act it is 'the Government of India or the Local Government' (not the High Court) who 'may, by order stay any proceedings taken under this chapter and may direct any warrant issued under this Chapter to be cancelled.....' This section ousts the jurisdiction of this Court to inquire into the propriety of the warrant, but leaves open the question of this Court's power to interfere with a Magistrate's action, if it was proved that such action was consequent upon a warrant issued by a Political Agent which was plainly illegal."

The above remark exactly applies to the present case. The procedure for requisitioning the surrender

(1) (1912) 39 Cal. 154.

(2) (1905) 7 Bom. L. R. 463.

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of any person accused of having committed any offence not necessarily the extradition crime, is laid down in section 9 of the Act, but the requisition in such a case has to be made "to the Government of India or to any Local Government". In the present case no such requisition was made; therefore the warrant in question which was addressed to the District Magistrate of Champaran cannot possibly be supported under section 9 either [*vide* also *Gulli Sahu v. Emperor*(1)].

The contention of the learned Counsel on behalf of the petitioner as to the illegality of the warrant and the want of jurisdiction of the Magistrate of Champaran to arrest the petitioner and detain him in jail under the authority of that warrant appears to us to be substantial. We however, do not think that there is any substance in the other contentions of the learned Counsel. If proper action was taken under section 9 of the Act, perhaps the objection of the learned Counsel as to the legality of the arrest and detention of the prisoner would not have been valid, nor his contention that a fugitive offender of the Nepal territory could not be arrested in British India for offences other than those enumerated in the treaty between the Nepal Government and the British Government. [Treaty with the State of Nepal, dated the 10th February, 1855, A. D. together with Memorandum, dated 24th June, 1881, supplemental thereto.]

Reliance is placed upon section 18 of the Extradition Act to show that section 9 should be deemed to have been controlled by the Treaty inasmuch as nothing in the Act has been declared to derogate from the provisions of the Treaty for the extradition of offenders. That contention does not appear to be sound. If the Treaty prohibits extradition for offences not specified therein such prohibition overrides the provisions of the Schedule by virtue of section 18; but there is no such prohibition in the Treaty and therefore section 9 does

 (1) (1914) 41 Cal. 460.

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not in any way derogate from the provisions of the Treaty. The Act practically enhances the power of the Nepal Government to requisition the authorities in British territories to arrest and deliver fugitive offenders of their territory.

There appears to be some misapprehension of the offence said to have been committed by the prisoner in Nepal. The report of the District Magistrate says that the petitioner escaped from the Nepal territory where he was kept awaiting trial for murder. The evidence forwarded by the Nepal Government to prove the criminality of the prisoner would only at the best disclose clearly a charge of abetment of murder. Abetment of murder is not one of the offences mentioned in the Treaty. Section 13 of the Act however makes the provisions of Chapter III apply to abetment of offences also. The evidence, however, forwarded by the Nepal authority does not disclose anything against the petitioner beyond vague hearsay evidence of his having offered to certain people some money to cause the murder of certain persons.

The matter raised in this application is of great importance and we do not think that we would be justified in passing final orders in this case until we hear the learned Government Advocate. We therefore request the learned Government Advocate to go through the papers of the case and to appear in the case at an early date.

Ross, J.—I agree.

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JWALA PRASAD AND ROSS, J.J.—We have heard the learned Government Advocate who says that he has considered the law and authorities in the case and that he cannot take any exception to the view expressed in our decision of the 23rd November, 1921.

We therefore hold that the petitioner was arrested under an illegal warrant and we therefore direct that he be released at once.