

REVISIONAL CRIMINAL.

Before James and Agarwala, J.J.

MOONGA LAL KEOT

v.

THE KING-EMPEROR.*

1933.

Feb. 1.

Extradition Act, 1903 (Act XV of 1903), sections 7, 8A and 18—Treaty with Nepal—Article V—“neither Government shall be bound to surrender”, meaning of—provisions of the Act, whether take away the discretion given by Treaty—Article V, whether excludes the operation of section 7—extradition sought against British subject—discretion in Local Government under the terms of Treaty—procedure to be followed—Government, exercise of powers under the Act by—Municipal courts, whether can interfere on the ground that Government had undertaken to act otherwise by Treaty.

The Indian Extradition Act, 1903, is the law of the land, not, so far as the third Chapter is concerned, to be applied for this or that country by Order in Council or by any special means. If some special procedure has been arranged by Treaty, section 18 of the Act provides that it may be followed; but if the Government should choose to exercise the powers given by the Act, no Municipal court can interfere on the ground that the Government had undertaken to act otherwise by Treaty.

Article V of the Treaty between the East India Company and the Nepal State provides :—

“In no case shall either Government be bound to surrender any person accused of an offence, except upon requisition duly made by, or by the authority of, the Government within whose territories the offence shall be charged to have been committed, and also upon such evidence of criminality, as according to the laws of the country in which the person accused shall be found, would justify his apprehension, and sustain the charge if the offence had been there committed.”

Held, (i) that the provision that neither Government shall be bound to surrender is to be read in its ordinary sense, as implying that each Government retains a right to exercise its discretion in the matter of the surrender of its own subjects.

In re Galwey(1), followed.

* Criminal Revision no. 25 of 1933, against the order of L. A. Duff, Esq., Subdivisional Officer of Supaul, dated the 3rd of January, 1933.

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(ii) that the provisions of the Extradition Act do not take away the discretion of the Local Government or injuriously affect its exercise in such a way as to derogate from the provisions of the Treaty, and, therefore, that Article V does not exclude the operation of section 7 of the Act;

(iii) that if the person whose extradition is sought is a British subject in whose favour this discretion might possibly be exercised by the Local Government, he should raise the point before the District Magistrate, who would then refer the matter for the orders of the Local Government under section 8A of the Act.

The facts of the case material to this report are set out in the judgment of James, J.

S. N. Sahay and *R. N. Lal*, for the petitioners.

Sir Sultan Ahmad, *Government Advocate*, for the Crown.

JAMES, J.—This is a proceeding under section 491 of the Code of Criminal Procedure. The British Envoy at Nepal issued a warrant under section 7 of the Indian Extradition Act of 1903 for the arrest and extradition of the petitioners for certain offences reported to have been committed in Nepal. The District Magistrate took the statements of the petitioners and reported the matter to the Local Government under section 8A of the Act, incorporating in his report the findings of the Subdivisional Magistrate of Supaul on an enquiry which he has conducted at an earlier stage when it was understood that these persons would be tried in British India under section 188 of the Code of Criminal Procedure. The District Magistrate reported that the petitioners were residents of British India; but the Local Government after examining the records decided that there would be no justification for refusing extradition and directed that the petitioners should be made over to the Government of Nepal.

Mr. Sri Narain Sahay on behalf of the petitioners argues in the first place that the Local Government has no power to order extradition of British subjects to

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Nepal, and, secondly, that in any event the issue of a warrant under section 7 of the Extradition Act against British subjects is illegal, because in any reading of the Treaty with Nepal a discretion is retained as to whether a British subject shall or shall not be surrendered. He also argues that the procedure adopted is repugnant to the provisions of the fifth article of the Treaty of 1855, which provides that neither Government shall be bound to surrender any person, except upon requisition duly made by the authority of the Government within whose territories the offence is charged to have been committed, and also upon such evidence of criminality, as according to the laws of the country in which the person accused shall be found, would justify his apprehension, and sustain the charge if the offence had been there committed. It is suggested that the provision in these articles that neither Government shall be bound to surrender should be read as meaning that neither Government shall in any circumstances surrender.

If the treaty with Nepal contained, as according to Mr. Sri Narain Sahay it does contain, an express prohibition against surrender of British subjects, it is possible that the protection of the High Court might be claimed for British subjects, as it was claimed and granted by the Queen's Bench in *Wilson's case*⁽¹⁾. In that case the Government of Switzerland had applied for the extradition of a British subject, which was prohibited by the Treaty; but it may be remarked that the terms of the Order in Council, which made the Extradition Act applicable to Switzerland, limited its application to cases governed by the Treaty. The Indian Extradition Act provides that nothing in the Act shall apply in derogation of treaty powers: but I doubt whether this provision can be properly treated by Municipal Courts as taking away from Government power given by the Act, merely because the power may have been previously limited by Treaty. There is a difference between the limitations imposed

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by section 18 of the Indian Extradition Act on the one hand and an Order in Council on the other reciting the Treaty, and making the English Statute applicable only subject to the conditions of the Treaty. As my learned brother pointed out during the argument, the Indian Extradition Act is the law of the land, not, so far as the third chapter is concerned, to be applied for this or that country by Order in Council or by any special means. If some special procedure has been arranged by Treaty, section 18 of the Act provides that it may be followed; but if the Government should choose to exercise the powers given by the Act, no Municipal Court could interfere on the ground that the Government had undertaken to act otherwise by Treaty.

This question does not really arise, because the meaning of the words "shall not be bound" has been determined by authority. In nearly all the extradition treaties some provision is made either prohibiting the extradition of subjects of the country from whom extradition may be demanded, or leaving the matter within the discretion of that Government. The question of what is the meaning of the provision that the Government shall not be bound, which is found in the Treaty with Nepal, was considered by the Queen's Bench in *Galwey's* case⁽¹⁾. The extradition treaty with Belgium provides that

"in no case, nor on any consideration whatever, shall the high contracting parties be bound to surrender their own subjects".

Lord Russell of Killowen, with whom his companion Judges concurred, held in that case that the provision implied that the British Government retained a discretion as to whether British subjects should be surrendered. It was found that there was no prohibition against surrender, such as was contained in the treaty with Switzerland which had come under consideration in *Wilson's* case⁽²⁾. It appears to be clear that the provision that neither Government shall be

(1) (1896) 1 Q. B. D. 230.

(2) (1877) 3 Q. B. D. 42.

bound is to be read in its ordinary sense, as implying that each Government retains a right to exercise its discretion in the matter of the surrender of its own subjects.

Mr. Sri Narain Sahay argues in the second place that though the second article may merely mean that the Local Government is entitled to exercise its discretion in the matter of surrendering British subjects, the fact that that discretion is retained must necessarily require the Government of Nepal to take action under section 9 of the Indian Extradition Act for the extradition of British subjects, and that it must exclude the operation of section 7. Section 18 of the Indian Extradition Act provides that nothing in Chapter III of the Act shall derogate from the provisions of any Treaty for the extradition of offenders, and that the procedure provided by any such treaty shall be followed in any case to which it applies. It is argued on behalf of the petitioners that the issue of a warrant by the British Envoy addressed to the District Magistrate of the district in which the fugitive offender may be would be in derogation of the provisions of the Treaty, because where a discretion is retained by Government, the requisition should in the first place be addressed to the Local Government, since otherwise if the District Magistrate should surrender a fugitive offender without reference to Government, the Local Government would be prevented from exercising the discretion which is vested in it by the Treaty. The law of extradition, so far as the powers of Local Governments or the Government of India in dealing with British subjects are concerned, is contained in the Indian Extradition Act (XV of 1903). Section 7 of that Act provides that when an extradition offence has been committed or is supposed to have been committed by a person not being a European British subject, and such person escapes into or is in British India, and the Political Agent issues a warrant, addressed to the District Magistrate of the district in which such person is believed to be,

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the Magistrate will in due course proceed to execute it. Under section 8A, the Magistrate may report the case for orders of the Local Government; and by section 15 the Government of India or the Local Government may stay the proceedings, or may direct that the warrant be cancelled. It may be true that under the Treaty the Local Government has absolute discretion to refuse to surrender a British subject to the Government of Nepal; but it is difficult to see how the provisions of the Indian Extradition Act take away that discretion or injuriously effect its exercise in such a way as to derogate from the provisions of the Treaty. It appears to be clear that if the person whose extradition is sought is a British subject in whose favour this discretion might possibly be exercised by the Local Government, he should raise the point before the District Magistrate, who would then refer the matter for the orders of the Local Government under section 8A of the Act as was done in the present case, when the Local Government after considering all the circumstances came to the conclusion that there would be no justification for refusing extradition.

Mr. Sri Narain Sahay suggests that the procedure followed is in contravention of the fifth article of the Treaty; but the fifth article leaves a discretion to Government; and it is not for us to dictate whether the Government should proceed in accordance with the law or should take its stand on the Treaty. In this particular case, the British Envoy forwarded with his warrant a requisition from the Prime Minister himself, requesting him to take steps for the arrest and surrender of the persons accused. It does not appear that the warrant issued by the British Envoy was illegal; and there would be no justification for any interference with the order that the petitioners shall be surrendered. The rule must, therefore, be discharged, and the application must be rejected.

AGARWALA, J.—I agree.

Rule discharged.