

**PRIVY COUNCIL.**

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*Before Viscount Duncannon, Lord Thankerton, Lord Russell  
of Killowen, Sir George Lowndes and Sir Dinshah Mulla.*

1931

Feb. 27.

BHAGAT SINGH AND OTHERS

*versus*

THE KING-EMPEROR.

*Constitutional Law—Legislative Power of Governor-General—Emergency—Criminal Law—Constitution of Special Tribunal—Absence of Appeal to High Court—Privy Council Practice—Special Leave to Appeal—Government of India Act, 1915 (5 & 6 Geo. V. c. 61), s. 72 (as amended by 9 & 10 Geo. 5 c. 101, Sch. II. P. C. II).*

In proceedings under an Ordinance promulgated by the Governor-General under the Government of India Act, 1915, s. 72, which authorizes him in cases of emergency to promulgate Ordinances for the peace and good government of British India, it cannot be disputed that an emergency existed and that the Ordinance is one for the peace and good government of British India. Those are matters of which the Governor-General is the sole judge; he is not bound to give any reasons for promulgating an Ordinance under the section.

An Ordinance so promulgated constituting a special tribunal for the trial of a criminal case is not invalid in that it deprives the accused of the right of appeal to the High Court which they would otherwise have had.

✓ Petition for special leave to appeal from convictions by the Tribunal constituted under the Lahore Conspiracy Case Ordinance, 1930, rejected.

*Petition for special leave to appeal from convictions by the Lahore Conspiracy Case Tribunal, Lahore, on October 7, 1930.*

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On May 1, 1930, the Governor-General, in exercise of the powers conferred on him by s. 72 of the

Government of India Act, 1915, made and promulgated the Lahore Conspiracy Case Ordinance, 1930, which transferred the trial of a case, known as the Lahore Conspiracy Case, to a tribunal to be constituted by the Chief Justice of Lahore, and consisting of three judges of the High Court, the tribunal being given powers to deal with wilful obstruction to its proceedings. The promulgation of the Ordinance was accompanied by a statement of the reasons moving the Governor-General to the exercise of his powers.

The terms of the Government of India Act, 1915, s. 72, as amended by the Act of 1919 Sch. II, Pt. II, appear from the judgment of the Judicial Committee.

The twelve petitioners, who had originally been charged with others before a magistrate on July 4, 1929, were tried by the Tribunal constituted under the Ordinance, and consisting of Hilton, Abdul Qadir, and Tapp JJ.

On October 7, 1930, judgment was delivered convicting the petitioners of offences under ss. 121 (waging war against the King, or attempting or abetting the same) and 302 (murder) of the Penal Code, and of offences under the Explosive Substances Act, read with s. 121 B (Criminal Conspiracy) of the Penal Code. Three of the petitioners were sentenced to death, seven to transportation for life, and two to terms of rigorous imprisonment.

During the progress of the proceedings one of the petitioners had applied unsuccessfully to the Tribunal to consider and record a question whether it had jurisdiction. There had also been unsuccessful applications to the High Court under ss. 491 B and 561 of the Criminal Procedure Code by way of *habeas corpus*.

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*Pritt K. C.* (with him *Horace Douglas* and *C. Sidney Smith*). The legislative power of the Governor-General under s. 72 is subject to three conditions (1) there must be an emergency, (2) the Ordinance must be for the peace and good government of British India, (3) the Ordinance must be within the legislative power of the Indian Legislature. None of these conditions existed. It was for the prosecution to show that an emergency existed, but they failed to do so. There was no emergency within the meaning of the section. The statement by the Governor-General which accompanied the promulgation did not show any emergency. The Ordinance was not one for the peace and good government of British India. By ss. 65 and 84 (a) the Governor-General in Council cannot legislate so as to affect Imperial Legislation or the prerogative of the Crown. The Ordinance by depriving the accused of the right to appeal to the High Court infringed those limitations. The High Court at Lahore was constituted under s. 113 of the Act. The letters patent consequently have the authority of Imperial legislation, and they provide for the hearing of appeals in criminal matters (Reference was made to *Imperator v. Chenappa Shantirappa* (1)).

*Dunne K. C.* and *Wallach* for the Crown referred to article 37 of the letters patent which provides that they are to be subject to, among other powers, the power under s. 72.

Otherwise they were not called upon.

At the conclusion of the argument their Lordships intimated that they would humbly advise His Majesty to dismiss the petition for reasons to be given later.

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(1) Bombay High Court, September 1, 1930.

The judgment of their Lordships was delivered by—

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VISCOUNT DUNEDIN.—This case does not fall within the strict rule that has been again and again laid down that this Board does not and will not act as a tribunal of criminal appeal, because here the objection, if it were good, would go to the root of the jurisdiction. But it is subject to the ordinary criterion which is applied to all petitions for special leave to appeal, to wit, that leave will not be granted where upon the face of the application it is plain that on the merits it is bound to fail.

Now the only case that is made here is that section 72 of the Government of India Act did not authorise the Governor-General to make the order he did constituting a special tribunal for the trial of the offenders who, having been convicted, are now petitioners here. The 72nd section as amended is as follows :—

“ 72. The Governor-General may, in cases of emergency, make and promulgate Ordinances for the peace and good government of British India or any part thereof, and any Ordinance so made shall for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian Legislature ; but the power of making Ordinances under this section is subject to the like restrictions, as the power of the Indian Legislature to make laws; and any Ordinance made under this section is subject to the like disallowance as an Act passed by the Indian Legislature and may be controlled or superseded by any such Act.”

The petitioners ask this Board to find that a state of emergency did not exist. That raises directly the question who is to be the judge of whether a state of

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emergency exists. A state of emergency is something that does not permit of any exact definition:—It connotes a state of matters calling for drastic action which is to be judged as such by some one. It is more than obvious that that some one must be the Governor-General and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action, and that action is prescribed to be taken by the Governor-General. It is he alone who can promulgate the ordinance.

Yet, if the view urged by the petitioners is right, the judgment of the Governor-General could be upset either (a) by this Board declaring that once the ordinance was challenged in proceedings by way of *habeas corpus* the Crown ought to prove affirmatively before a Court that a state of emergency existed, or (b) by a finding of this Board—after a contentious and protracted enquiry—that no state of emergency existed, and that the ordinance with all that followed on it was illegal.

In fact, the contention is so completely without foundation on the face of it that it would be idle to allow an appeal to argue about it.

It was next said that the ordinance did not conduce to the peace and good government of British India. The same remark applies. The Governor-General is also the judge of that. The power given by section 72 is an absolute power, without any limits prescribed, except only that it cannot do what the Indian legislature would be unable to do, although it is made clear that it is only to be used in extreme cases of necessity where the good government of India demands it.

It was urged that there was repugnancy between the ordinance as passed and the constitution of the

High Court of Lahore, and that the terms of section 84 (a) make void the ordinance because of such repugnancy. But, as soon as it is admitted, as counsel candidly did admit, that an Act might be passed by the Indian legislature under the powers of section 65 in the same terms as the ordinance the point as to repugnancy vanishes.

Their Lordships must add that, although the Governor-General thought fit to expound the reasons which induced him to promulgate this ordinance, this was not in their Lordships' opinion in any way incumbent on him as a matter of law.

Their Lordships, for these reasons, have humbly advised His Majesty that this petition should be dismissed.

*A. M. T.*

*Petition dismissed.*

Solicitors for petitioners: *Douglas Grant and Dold.*

Solicitor for Crown: *Solicitor, India Office.*

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