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Therefore it seems to me that this is a case where the Magistrate had no real jurisdiction, and that consequently it is not one which can be held to fall within the scope of mere irregularities dealt with in section 537 of the Criminal Procedure Code.

In the result I concur with the order proposed by my learned brother. At the same time I quite realise that the Court should not be too technical in matters of this kind, and if it had not been a clear point of jurisdiction I should have been very disinclined to interfere. But the police can easily make arrangements to meet the difficulty that has arisen in this case, and I do not think our decision should result in any material interference with the proper carrying out of their duties under the Act of 1923.

Order set aside.

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CRIMINAL REVISION.

Before Mr. Justice Marten and Mr. Justice Fawcett.

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October 14.

In re JAGERDEO RAMSUMER TEWARI^{*}.

Criminal Procedure Code (Act V of 1898), section 491—Habeas Corpus—Foreigners Act (III of 1864), section 3A—Alleged foreigner—Arrest by Commissioner of Police—Report—No orders from Government—Continued detention.

Where the Commissioner of Police has, under section 3A of the Foreigners Act (III of 1864), ordered a foreigner to be detained or released on bail, he must report the fact to the Local Government forthwith, and the order of the Local Government, directing either the discharge or the removal of the foreigner, must be passed without delay, i.e., within a reasonable time of the receipt of the report. Otherwise the detention of the person concerned would be illegal or improper within the meaning of section 491 (1) (b) of the Criminal Procedure Code (Act V of 1898).

^{*} Criminal Application No. 294 of 1924.

THIS was an application under section 491 of the Criminal Procedure Code.

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On September 17, 1924, the applicant and his two brothers were arrested and detained in person by the order of the Commissioner of Police, Bombay, under section 3A of the Foreigners Act. The arrest, however, was not reported to the Local Government as required by the Act until September 23, 1924, on which day the applicants obtained a rule *nisi* against the Crown to show cause why an order should not be made:—

(a) that the petitioners should be brought before the High Court to be dealt with according to law,

(b) that they should be set at liberty.

On September 26, 1924, when the rule came up for hearing it was pointed out by the Court that the failure of the Commissioner of Police to report the arrest to the Local Government at the time he issued the warrant was in contravention of the provisions of the Act. This objection was waived as being technical; and the parties desiring to have the matter determined on its merits, viz., as to whether the accused were foreigners or not, the Court suggested the *pro forma* release and re-arrest of the accused; a new report to the Government by the Commissioner of Police and a supplementary proceeding under section 491 of the Criminal Procedure Code with the original application to be brought before the Court on October 9, 1924. When the case was called on again on October 9, 1924, there was still no order from Government as required by the Act and the hearing was adjourned till October 14, 1924. On October 14, 1924, however, when the rule was finally heard, the order of Government was not forthcoming.

Kazi Kabiruddin, with *Y. V. Bhandarkar*, for the applicants.

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Kanga, Advocate General, with *S. S. Patkar*, Government Pleader, for the Crown.

MARTEN, J. :—This is an application under section 491 of the Criminal Procedure Code in the nature of *Habeas Corpus*. The accused who are three brothers complained originally to us that they were illegally arrested by the Police on September 17, 1924; that it was not till several days afterwards that they were told what the charge against them was; that they were then informed that they were charged with being undesirable foreigners whom it was intended to deport; and that the case was being reported to Government for orders.

Accordingly, on September 23, a rule *nisi* was obtained from this Court, and on the same day it appears that the Police reported the matter to Government.

The rule came before us for hearing on September 26, when it was pointed out by the Court that, having regard to the Act under which the Authorities were proceeding, viz., section 3A of the Foreigners Act III of 1864 which has been inserted in that Act by section 3 of Act III of 1915, it was incumbent on the Commissioner of Police to report the case to the Local Government at the same time as he issued a warrant for the apprehension of the alleged foreigner. Consequently, as the arrest was on the 17th, and the case was not reported to Government till September 23, it could not be said, having regard to that period of six days, that the Commissioner had complied with subsection (1) of section 3A.

But that was recognised at the time as being a technical objection. The parties wanted to have the matters determined, if possible, on the merits, viz., as to whether the accused were foreigners or not, and

accordingly, on the suggestion, I think, of the Court, the accused were *pro forma* released and then re-arrested. There was also to be a new report to Government so as to comply with sub-section (1). Then the prosecution agreed that accused Nos. 2 and 3 should be released on bail by the police under sub-section (4), but accused No. 1 was to remain in custody. Then there was to be a supplemental petition under section 491 of the Criminal Procedure Code to this High Court which was to be brought on for hearing with the original application on October 9.

This intervening period from September 26 to October 9 was to meet the convenience of the parties. The onus of proving that they were not foreigners fell upon the applicants. They wanted to produce further evidence to show that they were not foreigners. On the other hand it was stated by the Advocate General that the Crown wanted to get further information as regards the treaty under which the territory in question was alleged to have been ceded by Government to the Raja of Benares. Further, there was certain other statement made in the then affidavit of the Deputy Commissioner of Police which really repeated hearsay matters as having been reported to him by one of the Police Superintendents in Benares. Accordingly on the facts the Crown also wanted this adjournment. At that time this was considered a reasonable period in which both parties would get their case in order so as to enable it to be disposed of at the next hearing.

Accordingly on October 9, this case came again before the Court. So far as the prosecution was concerned, it was in very much the same state as it had been on the preceding September 26. There was no order from Government as required by the Act, nor was there any evidence about the terms of the cession of the territory to the Raja of Benares.

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I should explain that the importance of that point is this. It is common ground that the accused were all originally British subjects, that is to say, that the father of the three accused was born in British territory and further that all these three accused were also born in British territory. But what has happened subsequently is that their native village has, it is said, been ceded by Government to the Raja of Benares. It was accordingly said that these men had lost their original British nationality and had acquired the status of subjects of a Native State. It was also alleged that, being subjects of a Native State, they were now foreigners within the meaning of the Foreigners Acts. That, if necessary, would be a point to be argued, and also it would have to be shown that Government had the power to cede this territory to the Raja of Benares and also that there was nothing in the treaty which would preserve the original national rights as British subjects of any persons in the position of the accused.

On the other hand the accused have alleged that their father was carrying on business in Bombay for some forty years in connection with buffaloes and the sale of milk, and that they themselves have been in Bombay for a large number of years. The first petitioner claims to have come to Bombay in 1909 ; the second petitioner in 1909 and again in 1914 ; and the third petitioner in 1916. They say that they have a large business in Bombay ; that they own a large number of buffaloes ; and that their assets are worth over half a lac of rupees ; and that accordingly it is a great hardship on them that they should suddenly be arrested and their animals be left to the tender mercy of others.

This is how the facts stood on October 9, when we granted a further adjournment till today. We also

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directed that any further affidavit which the prosecution wished to put in should be put in by October 13, peremptorily. Clear intimation was also given to the Advocate General by the Bench that unless the requisite order from Government for deportation, or alternatively for discharge, was obtained by today, then the natural and probable consequence would be that we should direct the accused to be discharged.

An affidavit has since been put in by the prosecution but in effect it carries the case no further. Substantially nothing further has been done by the prosecution. We are still without the treaty, but what is more important we are still without any order from Government. The order that I have made such frequent reference to is that contained in sub-section (1), viz.,

"Whenever in a Presidency town the Commissioner of Police, or elsewhere the Magistrate of the District, considers that the Local Government should be moved to issue an order under section 3 in respect of any foreigner who is within the limits of such Presidency town or of the jurisdiction of such Magistrate, he may report the case to the Local Government and at the same time issue a warrant for the apprehension of such foreigner."

Then sub-section (5) provides that:—

"Any officer who has, in accordance with the provisions of sub-section (4), ordered a foreigner to be detained or released on his executing a bond shall forthwith report the fact to the Local Government. On the receipt of a report under this sub-section the Local Government shall without delay either direct that the foreigner be discharged or make an order for the removal of such foreigner in accordance with the provisions of section 3."

Then turning to the main Act, section 3 provides that:—

"The Governor General of India in Council may, by writing, order any foreigner to remove himself from British India, or to remove himself therefrom by a particular route to be specified in the order; and any Local Government may, by writing, make the like order with reference to any foreigner within the jurisdiction of such Government."

It will be seen, therefore, that in this class of case everything depends upon the order of Government.

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The Commissioner of Police has no power to deport anybody under this Act. It is not like cases under the Bombay Police Act where a certain discretion—and a wide discretion—is given to the Commissioner of Police to deport certain people who are believed to be the associates of thieves and so on.

What power then is there to detain accused No. 1 any longer in custody, and what power is there to impose the conditions of bail on accused Nos. 2 and 3, as the price of their retaining an ostensible liberty? In my opinion the case today has reached a point where, without an order from Government of deportation under section 3 of the Act, any such continued detention or any such continued bail is an illegal or an improper detention within the meaning of section 491 (1) (b) of the Criminal Procedure Code, or alternatively these particular accused are not being dealt with according to law within the meaning of section 491 (1) (a).

In my judgment it is incumbent on Government under section 3A, sub-section (5) of the Foreigners Act, to give their orders for the discharge of the foreigner, or else for his removal under sub-section (5) without delay. I quite recognise that a reasonable time must be allowed in such cases, and that naturally, owing to the conditions under which Government Departments must work, one cannot expect that matters of this sort can be dealt with with the same speed as if it was merely a case of making an application direct at once to some single individual who had complete power to dispose of the matter there and then.

But I do feel this strongly. We are dealing here with the liberty of the subject. Shortly stated this man, accused No. 1, has been under arrest and in the custody of the Police from September 17 up to

today. That is nearly a month. The original action taken by the Commissioner of Police in not reporting the matter to Government forthwith after the arrest was in my opinion illegal. That matter was put straight on September 26. But even then a whole fortnight has elapsed and even still, as I have already stated, there is no order from Government.

As far as I can see here, a wrong procedure had been adopted. The matter should have been investigated first, and the arrest made afterwards. Then there would have been no difficulty in obtaining the orders of Government soon after the arrest. But it does not rest with the Commissioner to deport alleged foreigners under the Foreigners Acts. That is a matter for the Government and solely for the Government. But there the Act, as I have explained, puts a restriction on the executive powers of Government of deportation, viz., that they must be exercised without delay on the receipt of the report from the Commissioner of Police.

In my opinion the time that has elapsed here does constitute such delay. Further, in my opinion, it would be unfair on the petitioners to postpone the present hearing of this rule *nisi* any longer. This is the third time on which it has come up for hearing. To day there is no order of Government as to these men's deportation. Accordingly in my opinion this rule *nisi* ought to be made absolute and all three men discharged from custody or detention.

Under these circumstances it is unnecessary for this Court to say anything on the point whether these men are foreigners within the meaning of the Act. There being, in my judgment, a clear ground on which this rule should be made absolute I do not see the necessity or the desirability of embarking on a discussion of a point which in my judgment is not necessary for our

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decision on the main point of the case, which after all is whether these men should be set at liberty or whether they should any longer be detained in the custody of the Police.

FAWCETT, J. :—I agree in making the rule absolute on the ground that these three persons are being improperly detained. Pending the proceedings two of them have been released on bail, but in effect they are in detention under special arrangements for their temporary liberty.

The authority vested in the Commissioner of Police to arrest a person, who he thinks is a foreigner, under sub-section (1) of section 3A is one that he can, in my opinion, exercise by himself, and I do not think that his power is restricted to a case where he can simultaneously obtain orders from Government for the removal of such foreigner. But undoubtedly sub-section (5) requires that after the Commissioner of Police has reported that he has ordered the foreigner to be detained or released on bail, the Local Government is to take action without delay. Accordingly when sub-section (4) of the same section 3A authorises the Commissioner of Police to direct a foreigner to be detained in custody pending the orders of the Local Government, this must obviously be read with the direction in sub-section (5) that I have already mentioned, requiring these orders to be given without delay. That is to say, it cannot be contended that the Commissioner of Police could direct a foreigner to be detained in custody for an unreasonable length of time pending the orders of the Local Government, e.g., for six months.

In my opinion the provision of sub-section (5) about the orders being given without delay is mandatory, and sub-section (4) must be read as if the words "pending

the orders of the Local Government" were qualified by the words "such orders being obtained within a reasonable time" for "without delay" means this.

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I agree with my learned brother that the fortnight or more that has expired since the proceedings when these persons were re-arrested on September 26 has given ample time for obtaining the orders of the Local Government, and that the delay renders the further detention of these persons improper. I do not mean to lay down any general rule that an order must always be obtained within a fortnight after the report of the Commissioner of Police. But in view of the warning we gave and the other circumstances, especially the legitimate doubt that arises whether these people are really foreigners, it is a case where this Court is justified in exercising the powers given it by section 491 of the Criminal Procedure Code.

Their Lordships next dealt with the question of costs and delivered the following judgments.

MARTEN, J. :—As regards the question of costs, Rule 5 of the Appellate Side Rules, 1920, provides that "In disposing of any such rule, the Court may, in its discretion, make an order for the payment by one side or the other of the costs of the rule". We think in this case that the costs of the Rule should be paid by the respondent. As regards the mode in which these costs are to be ascertained the applicant appears here by counsel, Mr. Kazi Kabiruddin, instructed by a High Court Pleader, Mr. Bhandarkar. It was suggested to us that we should make an order that the costs be taxed as on the Original Side. I am aware that this is a form of order which is sometimes made in an appropriate case in certain branches of this Court. But speaking generally costs on the Original Side are matters between solicitor and client and are not between

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pleader and client. Consequently I do not think it would be proper in this present case to direct the costs to be taxed as on the Original Side.

On the other hand there is a suggestion by the Government Pleader that the petitioners should be content with Rs. 30 for the whole of these hearings, and that they are not to be allowed even the costs of their counsel. This contention appears to me to be wrong. The Crown appeared here by the Advocate General and the Government Pleader, and in my opinion, having regard to the importance and to the difficulty of the case, it was quite right and proper that the petitioners should wish to have counsel to oppose the Advocate General.

Under these circumstances, we think the proper order will be to direct the Registrar to assess the petitioners' costs of this Rule, and that in doing so he do allow reasonable costs of counsel and also reasonable costs of the affidavits which have been filed in support of the applications. The costs as so assessed to be paid by the respondent.

FAWCETT, J. :—I concur.

Rule made absolute.

R. R.
