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Accordingly we overrule the plea of limitation, and remand the case to the lower Appellate Court to be tried on the merits with reference to the above remarks.

Appeal allowed.

[EXTRAORDINARY ORIGINAL CRIMINAL.]

Before Mr. Justice Phear, Mr. Justice Macpherson, and Mr. Justice Mookerjee.

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May 11

THE QUEEN *v.* AMEER KHAN AND OTHERS.

Letters Patent, 1865, *cl.* 29—*Transfer of Criminal Case from Mofussil Court—Jurisdiction—Power of single Judge sitting on Original Side*—24 *and* 25 *Vict., c.* 104, *s.* 15.

On an application made for the transfer of a case from the Sessions Court at Patna for trial by the High Court at Calcutta, on the grounds, mainly, that all but one of the charges against the prisoners were for offences committed in Calcutta; that the selection of Patna as the place of trial was calculated to prejudice the prisoners; that the police at Patna were getting up the case against the prisoners by improper and illegal means; that by those means was created such a feeling of dread and insecurity among witnesses and others in Patna as would prevent a fair trial from taking place there; that some of the witnesses for the defence, although willing to give evidence in Calcutta, refused to go to Patna to give evidence; and that many difficult points of law were likely to arise at the trial, but these allegations were denied by the affidavits filed in opposition to the application,—*Held* (Macpherson, J., *doubting*) the High Court had power under clause 29 of the Letters Patent to transfer the case for trial by itself. The Court, however, refused the application, on the ground that a sufficient case had not been made out for the exercise of the power of the Court.

Per PHEAR, J.—A single Judge, sitting on the original side of the Court has power to entertain an application for the removel of a criminal case from a Court in the Mofussil to the High Court in the exercise of its extraordinary original criminal jurisdiction.

THE prisoners were charged with the offence of waging war, attempting to wage war, and abetting the waging of war against the Queen. The preliminary investigation had taken place before the Officiating Joint Magistrate of Patna, by whom they were committed to take their trial before the Sessions Judge of Patna. The present proceedings arose out of an application

made by Mr. Ingram on behalf of two of the prisoners, Ameer Khan and Hashmadad Khan, that their cases might be removed from Patna and be tried by the High Court, Calcutta, in the exercise of its extraordinary original criminal jurisdiction under clause 29 of the Letters Patent of 1865 (1).

Mr. *Ingram* (Mr. *Evans* with him) based his application on the following grounds :—

1. That the charges drawn up by the Magistrate were so vague and unsatisfactory that it was impossible for the prisoners to meet them.

2. That the evidence consisted principally of the testimony of convicted parties or accomplices, and that many nice points would arise in the case as to the admission or rejection of evidence which would require the decision of an experienced Judge.

3. That many important questions of constitutional law would be raised, which a Civilian Judge, who in his legal training was not required to be informed on such subjects, would find difficult to solve.

4. That Ameer Khan and Hashmadad Khan were, by reason of their residence in Calcutta up to the time of their arrest, entitled to be tried in Calcutta by jury, whereas the only Court for the trial of offences of this kind at Patna was the Judge and assessors.

5. That it was necessary to produce certain documents for the defence which could only be obtained by the orders of the High Court.

6. That the absence of any trained interpreters at Patna, and the ruling of the Magistrate that the employment of an interpreter was matter of grace and not of right, made it very doubtful whether competent interpreters would be allowed the prisoners in the Sessions Court.

(1) *Letters Patent*, 1865, *cl.* 29.— "And we do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court."

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7. That all but one of the charges in the indictment were for offences committed in Calcutta.

8. That forty-nine witnesses for the defence were resident in Calcutta, and that it would be impossible for the greater number of the witnesses to attend at Patna.

9. That the conduct of the Police respecting this case had caused such terror that many of the prisoners' witnesses have refused to attend at Patna, though willing to give evidence in the High Court.

He referred, in support of the applicaton, to the case of *The Queen* v. *Nabadwip Chandra Goswami* (1), as showing that the High Court has the power to transfer a criminal case to itself from the mofussil, and to *Doucett* v. *Wise* (2), as showing that the application for the transfer of a civil suit should be made on the Original Side of the High Court, and therefore by analogy should this application; and in support of his grounds he relied on several affidavits, which also stated that Ameer Khan and Hashmadad Khan had been, down to the time of their arrest in July 1869, residing in Calcutta; that Ameer Khan had been arrested without any warrant or proper authority; that, on 10th January 1871, he had been discharged and told to leave the jail, but on his doing so he had been immediately re-arrested on a warrent of the Magistrate of Patna, on the present charges; that Hashmadab Khan had been arrested, on 14th July 1869, without any warrant or proper authority, and taken out of the local limits of the jurisdiction of the High Court, Calcutta; that Mr. O'Kinealy, who had been appointed by Government to conduct the prosecution, was not a barrister, advocate, vakeel, or pleader in any Court in India; that many witnesses who could give evidence negativing that for the prosecution refused to do so at Patna from fear of the Government officials, and the police were taking bribes from some persons for excusing them from giving evidence, and compelling other persons to give evidence against the prisoners by bribes and by imprisoning them until they consented to do so, and by threats that if they did not give such evidence, or if they gave evidence on

(1) 1 B. L. R., O. Cr., 15.

(2) 1 I. J., N., S., 94, 227.

behalf of the prisoners they would be arrested and charged with being Wahabees, whereby the Police had caused many persons to abscond to Calcutta from fear; and had deterred others from giving evidence on behalf of the prisoners, or from holding communication with the prisoners or their counsel and legal advisers; that upwards of one hundred prisoners who had been induced by these means to give evidence against the prisoners were confined in the house and compound of Mr. Reily at Patna under the charge of the Police; and that the conduct of the Police and other officials at Patna had produced such an influence on the minds of the native inhabitants of Patna that it was impossible that a fair trial could take place there.

PHEAR, J. (after taking time to consider, on 21st April, made the following order).—You have, I think, made out a *primâ facie* case in support of your application, at any rate so far as Ameer Khan is concerned,—that is, such a case as would render it incumbent on the Court to issue a rule *nisi* if there were any one against whom the rule could go. As I understand the matter, however, so far as the proceedings have yet gone, no one has appeared in the character of prosecutor with such sanction of or authority from Government, express or implied, as would make him the person whom I could rightly call upon to show cause, on behalf of the Crown, why the case should not be transferred to this Court for trial, and I need hardly say that there exists no officer who permanently represents the Crown for such a purpose as this. Nevertheless, it is eminently apparent that this is a case in which not only is the abstraction termed the Crown as in all other criminal cases, the nominal prosecutor, but the Government is itself the active promoter of the proceedings. It is therefore aboundantly clear I think, that I ought not to take the step of removing the case, without affording the Government an opportunity of being heard against your application, if I can in any reasonably practicable mode do so. Now, in this Court the Advocate-General is always recognized in a special manner as the counsel and adviser of the Government in respect to both civil and criminal matters, and I believe that comparatively lately a gentleman has been appointed solicitor to the Govern-

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ment with functions such as to constitute him in some sense Crown prosecutor within the local limits of the original criminal jurisdiction of the High Court. Having regard to these circumstances, I think it will be an effective and convenient method of giving the Government an opportunity of appearing in this matter, that I should adjourn the further hearing of it until Monday next, and direct notice of the application and the adjournment to be given at once both to the Advocate-General and to the Government solicitor.

Notice of the application and adjournment was accordingly given. On April 22nd the Senior Government Pleader, on the appellate side of the Court, moved on the petition of the Government of Bengal, stating the Mr. Justice Phear was acting without jurisdiction in entertaining the application to transfer the case from Patna, and that such application should be heard by the particular Bench appointed under a rule of 12th December 1870, to dispose of cases from the District of Patna (1).

(1) *Before Mr. Justice Norman Officiating Chief Justice, and Mr. Justice Loch.*

The 22nd April 1871.

IN THE MATTER OF THE PETITION IN THE GOVERNMENT OF BENGAL.

THE QUEEN *v.* AMEER KHAN AND OTHERS.*

Baboo *Annada Prasad Banerjee*, the Senior Government Pleader, moved the High Court upon the following petition :—

"That it appears from the newspapers that application has been made to a single Judge of the High Court on its Original Side to transfer a criminal case pending in the mofussil, and the Judge has assumed jurisdiction, and directed notice to be given to the Advocate-General and to the Government Solicitor to show cause why the case should not be removed from the Sessions Court at Patna to the High Court in its extraordinary criminal jurisdiction.

"That your petitioner begs to submit that the order passed by the single Judge on the Original Side is without jurisdiction, inasmuch as the Chief Justice has not determined under sections 13 and 14 of the Charter Act of 1861 by whom such applications in general, and this application in particular, are to be heard ; and, further, inasmuch as a particular Bench has been appointed under Resolution of 12th December 1870 to hear criminal motions from the Patna District, that your petitioner therefore prays that your Lordships be pleased to pass such order as may seem to your Lordships meet and proper under the circumstances of the case."

The Judgment of the High Court was delivered by

NORMAN, J.—It appears to me quite plain that we have no power of interference at present. The application on behalf of Ameer Khan is now pending before Mr. Justice Phear, and

*Motion No. 52 of 1871.

The application was heard by Norman, J. (Officiating Chief Justice,) and Loch, J., but they refused to make any order in the matter.

On 24th April the *Advocate-General* appeared before Mr. Justice Phear on the notice which had been given of the application to transfer the case, and said he would, with the leave of the Court, make some observations with regard to the jurisdiction of which a judge sitting on the Original Side of the Court had to entertain such an application. He referred to the application made on the Appellate Side before Norman and Loch, JJ., and the judgment thereon, and contended that a Judge so sitting had no such jurisdiction. [PHEAR, J.—I threw out a doubt when the application was first made to me as to whether this was the right side of the Court on which to make it. I had no doubt however of my power to entertain the application. If you now say I have not the power, I will hear you on that point.] The application should be made to the Appellate Side of the Court. Such applications have not been made on the Original Side. In *The Queen* v. *Nabadwip Chandra Goswami* (1), the application was apparently made on the Appellate Side of the Court. So in the case of *Pogose* v. *Pogose* (2). On the ground of convenience it is better that the Court in its original jurisdiction should not interfere with criminal matters in the mofussil. Section 13 of 24 & 25 Vict., c. 104, gives power to the Court to make rules for the exercise of the jurisdiction vested in the Court, and section 14 provides that the "Chief Justice shall decide what Judge shall sit alone and what Judges of the Court shall constitute the several Division Benches." Under this power, dis-

has not been disposed of in any way. It may very well be that with reference to the 13th section of the 24 & 25 Victoria, c. 104 to a rule of this Court passed on the 28th May 1870, and the order for the distribution of business made on the 12th December 1870, a motion under the provisions of the 29th clause of the Charter to transfer a case pending before the Court of Sessions at Patna to any other Court should have been properly made before the 4th Bench of this Court on its appellate side, which hears motions in criminal matters relating to cases pending within the Patna District. But it seems to us that this matter will be properly considered by Mr. Justice Phear when it comes before him.

(1) 1 B. L. R., O. Cr., 15.

(2) Unreported.

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tricts have been fixed, and Division Benches appointed to hear cases from particular districts. See Rules for the Routine of Business, dated 26th January 1870 (1), and 12th December 1870 (2). [PHEAR, J.—In civil cases is not the application to remove the suit made on the Original Side of the Court?] Different considerations apply in criminal cases.

PHEAR, J.—Assuming that this Court has the power, under the 29th clause of the Letters Patent, to transfer a case from a Criminal Court in the mofussil to be tried before itself, I think this Bench is competent to entertain and adjudicate upon the application which Mr. Ingarm has made. By virtue of the 13th section of the Charter Act, the Judges who sit alone, and the Division Courts, which are composed of two or more Judges under duly made arrangements of the Court, separately, in my opinion, exercise the jurisdiction of the whole Court; in other words, a single Judge so sitting, and a Division Bench so constituted, is, for the purposes of the work brought before it, the High Court itself. I apprehend that the object of the sub-division which is authorized by section 13 of the Charter Act is simply the more expeditious and effective despatch of the judicial business. And in furtherance of this object, the judicial work of the Court is apportioned not very precisely, by rule, among the different Benches, and no doubt the number of Judges who are to form each Bench is settled with due reference to the nature of the work which falls to the Bench under the rule. This being so, it is undoubtedly clear, as I threw out when Mr. Ingram first made his application, that no Bench ought to take work which does not fall within its allotted province. But I think the judicial validity of acts done by each Bench *bonâ fide* cannot depend upon whether or not the particular matter dealt with lies, with logical strictness, within the limits assigned to the Bench by rule of apportionment. For if it were otherwise, it would always be open to a party bound by a decree of the High Court to question whether the Judge or Judges who passed it, although sitting as a regularly constituted Bench, were really possessed of

(1) 4 B. L. R., High Court Cir., 8. (2) 6 B. L. R., High Court Cir., 10.

the powers of the Court—a result never contemplated, I should say by the Legislature when it gave the power of distributing work under section 13 of the Charter Act. I suppose that it is incontestable that the Judge or Judges who in the ordinary course of business sit alone in this place on the original side of the Court, as it is termed, do so sit for the despatch of business, under a rule of Court; and it is for the despatch of all Judicial business, both civil and criminal, which rises out of or is connected with the local jurisdiction of the Court over the town of Calcutta, except that part of course which is appellate in its nature, and excepting also the trials by jury at the Criminal Sessions. Almost all applications in criminal matters, such as for writs of *Certiorari*, whether to issue into the town or into the mofussil, for writs of *habeas corpus ad tesficandum*, and so on, are made to the Judge who is sitting here for the discharge of the ordinary business on this side of the Court, and when made are heard and determined by him. There are also, I need hardly say, other special and important portions of the jurisdiction of the High Court which it is not necessary that I should now proceed to specify, and which are delegated by the High Court to the Judge who is sitting here for the disposal of the ordinary business of the Court. In truth, I imagine, it would be no easy task to include within any precisely defined line all that portion of work which ordinarily or by custom is taken up or disposed of by the Judge sitting here in the ordinary course. And therefore I think it would be a mischievous error to throw doubt on the power of any Bench sitting on this side of the Court for the disposal of ordinary business to take cognizance of and dispose of any particular matter, because it lay on the confines of the somewhat undefined area of ordinary practice. I cannot say that I have the smallest doubt of my authority and power, sitting here in the discharge of the ordinary business of the Court, to entertain and adjudicate on the application which Mr. Ingram has made.

Whether it is convenient or entirely regular that I should do so, is altogether another question; and, at first, I doubted whether it would not be better that the application should be preferred to a Bench of the Court sitting on the other side. But, on consideration, I think this is not so, and that the

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practice, so far as there is any practice to guide me, is in favor rather of the application being made here than there. The object of Mr. Ingram's application is to procure the removal of a criminal case into the High Court for trial. If the application, by whatever Bench, on whichever side, it be heard and determined, should ultimately be granted, the case will come on, as a matter of course, to this side to be tried. It seems to me *a priori* right that the application should be made to this side, where the cause will have to be tried. There is no distinction between the Judge on one side of the Court and on the other, and indeed I believe that it is a fact that if this application were made to a Bench on the other side of the Court, it would according to be course of business come on to be heard by a Bench of which the senior Judge is a barrister; and, so far as the personal experience goes which I think the learned Advocate-General referred to, is more familiar with the work and practice on this side than with any of the elements which, he says, are required to be taken into consideration in matters arising out of a different state of things in the mofussil. So that, in truth, I think the Crown can hardly say that there are any substantial reasons why this application should be dealt with by a Bench sitting on that side of the Court, rather than by a Judge sitting on this side. It appears to me, moreover, that the considerations upon which the property or otherwise of removing the case to this side of the Court depends may be presumed to be more likely to be better arrived at and dealt with on this side, where the case will have to be tried than on the other; so that in my view this application in its nature falls properly to the business on this side.

It is distinguishable from an application to remove a criminal case from one Mofussil Court to another Mofussil Court, just in the same way as an application to remove a civil suit for trial to this Court is distinguishable from an application to remove the same suit to another Mofussil Court for trial; and that distinction has been held a sufficient reason on the other side of the Court why a Bench on that side should not entertain such application. It seems to me that the reason is precisely the same in one instance as in the other. When the words of clause 29 of the Letters Patent are construed so as to authorize

the removal of a criminal case from a Mofussil Court into this Court, they become exactly paralled with the words of clause 13 which authorizes the Court to remove a civil suit into this Court. If, in one case, the side of the Court into which the cause is to be removed is the proper side to Judge of the propriety of the application to remove it, it seems to me it must be so in the other—*Doucett* v. *Wise* (1) ; and the course of practice which rests on that case determines the matter beyond question as regards civil suits. It seems to me that I am only following the practice so laid down, by saying that this application belongs properly to the business on this side of the Court.

A feeling of hesitation has passed through my mind as to whether or not the Judge to whom on this side of the Court is assigned the duty of presiding at the criminal Sessions is not the Judge who ought to take such an application as this, in preference to the Judge who merely sits here for the despatch of ordinary business. But I think now that that hesitation is not well grounded ; at any rate that it ought not to induce me to decline to hear this application, because no Judge has yet been appointed to take the next Criminal Sessions, and the particular appointment of the Chief Justice, under which I took the criminal work of the last Sessions assigs to me the disposal of all criminal matters until another, appointment is made.

I think, therefore, that there is no good reason why I should stop the hearing at the present stage, and I have given my reasons at some length, because I think the matter of some considerable importance.

A rule *nisi* was then granted calling on Mr. O'Kinealy, who had been appointed and authorised by the Government to conduct the prosecution in this case, to show cause why the case should not be transferred from the Court of the Sessions Judge of Patna to this Court, in its extraordinary original Criminal jurisdiction ; and on the application of the Advocate-General, who said he proposed arguing the question as to the power of the Court to transfer the case, as well as to oppose the appli-

(1) 1 I. J., N. S., 94, 227.

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cation on the merits, adjournment an was granted to allow time for the prosecution to put in affidavits in opposition to those in support of the application.

On 29th April a further petition was presented on behalf of Government, by the Government Pleader, to Norman, J., Officiating Chief Justice, Macpherson, J., and Mookerjee, J., praying that the proceedings in the application before Phear, J., should be stayed, and the question of law be tried before the full Court, under the powers given to the Court by section 15 of the Charter Act, 24 & 25 Vict., c. 104 (1). But the Court

(1) *Before Mr. Justice Norman, Offg. Chief Justice, Mr. Justice Macpherson, and Mr. Justice Mookerjee.*

The 29th April 1871.

IN THE MATTER OF THE PETITION OF THE GOVERNMENT OF BENGAL.

THE QUEEN *v.* AMEER KHAN AND OTHERS.

This was a petition to the High Court on behalf of the Government of Bengal, as follows:—

"An application was made to the Chief Justice and Mr. Justice Loch, on Saturday last, representing that Mr. Justice Phear had assumed jurisdiction on an application for the transfer of a criminal case from Patna to Calcutta. and that such an application could only be heard by a Bench of the Court appointed under sections 13 and 14 of 24 & 25 Vict., c. 104, under which the High Court is constituted.

"The Chief Justice and Mr. Justice Loch said that the matter was not in a stage in which they could interfere, although it might well be that, under the rules of the Court already made, such an application should properly be heard by the 4th Bench of the Court, as appointed to hear motions in criminal matters relating to cases pending in the Patna District, and the Court added that this matter would properly be considered by Mr. Justice Phear.

"This opinion was mentioned to Mr. Justice Phear, and the Advocate-General was heard in opposition to the hearing of the application by the learned Judge; but the Judge decided the other way, and delivered judgment, the gist of which seems to be, that the rules of Court apportioning the business cannot take away the inherent powers of every Judge to exercise the full powers of the Court, but are mere indications of the most convenient course, and that in the present instance the most convenient course was that the application should be heard by himself sitting where he was. He accordingly directed notice to be served on Mr. O'Kinealy, who has hitherto conducted the case on the part of Government, to show cause why the case should not be transferred from the Sessions Judge of Patna to the High Court for trial in its extraordinary original criminal jurisdiction.

"As it may be doubtful if an appeal will lie from Mr. Justice Phear's decision after a final order on the application has been passed, the Government wish to make it clear that it has neglected no means which the law may afford of obtaining a hearing before a Bench properly and conveniently constituted. It is submitted that many powers for and in excess of those to