

[APPELLATE CRIMINAL JURISDICTION]

1872,
January 11.

REG. v. LUKHMÁVIEW: CHÁNGO,

Bombay Act VII. of 1867, Sec. 27 — Music in private house—Police Prohibition.

Section 27 of Bombay Act VII. of 1867 does not empower the police to prohibit the use of music in private houses.

ON the 6th October 1871, Kaverji Kávasji, Magistrate F. P. at Tanna, convicted, under Sec. 29 of (Bombay) Act VII. of 1867, one Lukhmá Chángo of the offence of disobeying a proclamation, issued by the District Superintendent of Tanna, under the provisions of Section 27 of the same Act, and sentenced him (Lukhmá) to pay a fine of Rs. 5, or in default to suffer simple imprisonment for two days. The Magistrate observed in his finding:—

“It appears from the evidence recorded in the case that the accused Lukhmá Chángo, having collected some 27 or 28 persons in his house, beat violently and incessantly native drums beyond the prescribed hours, in breach of the orders promulgated by the District Superintendent of Police, under Bombay Act VII. of 1867.”

On a review of the monthly criminal return of the Magistrate for October 1871, the High Court sent for the record and proceedings of the case to consider whether the conviction and sentence were legal.

The proceedings were reviewed in Court by Gibbs and Melvill, JJ. on the 11th January 1872.

PER CURIAM:—The Court reverses the conviction and sentence passed upon the said Lukhmá Chángo on the ground that Section 27 of the Bombay Act VII. of 1867 does not empower the Police to prohibit the use of music in a private house.

Conviction and sentence reversed.

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[ORIGINAL CRIMINAL JURISDICTION.]

In re JAMES HASTINGS.

Habeas corpus—Warrant—Omission to seal—Description of person to be captured—Signature—Crim. Proc. Code Secs. 76 and 84.

A warrant issued under Section 76 of the Code of Criminal Procedure should be sealed, should describe the person to be apprehended under it with reasonable particularity so that there may be no difficulty in establishing his identity, and should be subscribed with the name and full official title of the Magistrate issuing it.

Where a warrant was defective in all the above particulars, the prisoner apprehended under it was released by the High Court.

ON the 19th of July 1872, *Anstey* moved for and obtained from Westropp, C.J., a writ of *habeas corpus* directed to the Chief Commissioner of Police, Bombay, and Henry John Brown, a Police Officer of the Bombay Police Force, commanding them to have before the High Court of Bombay, on the 20th January, the body of James Hastings together with the day and cause of his being taken, &c.

The writ was granted upon affidavits that stated that James Hastings was a European born British subject, and that he resided in Bombay and there carried on business as a Civil Engineer; that he had been arrested on the morning of the 19th January by Henry John Brown, a Police Officer of the Bombay Police Force, who asserted his right to hold the prisoner under a warrant, which he produced and showed to the deponent, and of which a copy was annexed to the affidavit. The warrant purported to be signed by F. A. Scott, who was said to be Deputy Commissioner of Nimar, in Central India. The affidavits also set out the grounds on account of which the warrant was said to be defective.

On this day F. H. Souter Esq., C. S. I., the Commissioner of Police, produced the body of James Hastings before the Court and the warrant under which he held the prisoner and undertook to put in a formal return to the writ. The following is an exact copy of the warrant the written portion of it being printed in italics:—

WARRANT OF ARREST.

(Under Section 76 of Act XXV. of 1861.)

To,—*The Commissioner of Police Bombay.*

Whereas *James Hastings* stands charge with the offence of *abetting the taking of gratification by a public servant in respect of an official act*: You are hereby directed to apprehend the said *James Hastings* and to produce him before me.

HEREIN FAIL NOT.

JOHN A. SCOTT.

F. P. Magistrate and J. P.

Dated 16th January, 1872.

seal.

There was an endorsement on the warrant which ran thus—

Endorsement under Section 181, Act XXV. of 1861.

If the said *James Hastings*Shall give bail himself in the sum of 10,000 *rupees*

with 2 sureties in the sum of

Rs 5,000 each.

to appear before me, on the

23rd day of *January*, 1872, he may be released.

JOSH A. SCOTT.

F. P. Magistrate and J. P.

Dated 16th January 1872.

The Honourable *J. S. White* (Advocate General) appeared for the Crown and submitted the validity of the warrant to the judgment of the Court.

Anstey for the prisoner:—The case before the court is one of great hardship upon the prisoner, but if the warrant, upon which he has been apprehended, is correct in form, he must only submit. I contend that the warrant is invalid in form as well as in substance for the following reasons:—

I. It does not bear the seal of the person who issued it, though it purports to be issued under Section 76 of the Code

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of Criminal Procedure which requires all warrants to be sealed. The seal is an essential part of the warrant. It was necessary at Common law: 2 Inst. 52; 1 Hale 577; 2 Hawk., ch. 13, s. 21; 4 Burns's J. 393; 4 Blk. Com. 290; though a contrary opinion is supposed of have been once held: Willes Rep. 411. In the absence of a statutory provision, the omission of a seal will render the warrant void: *In re William Phipps (a)*. The Code of Civil Procedure has in fact merely adopted and re-enacted the provisions of the common law on the important subject. The American law is the same in this respect: Hind on *Habeas Corpus* p. 399.

II. It is bad as being a warrant which does not show where the prisoner, when apprehended, is to be taken or before whom. A warrant to take to jail generally is bad: *Rex v. Smith (b)*. The name of the person who issued the warrant is, it is true, given, but there is nothing more than the letters F. P. and J. P. to show what authority he had to issue a warrant against a European born British subject. It is admitted that this defect might be cured by the averments in the return: *Elderton's case (c)*, but in the present case it is impossible for Mr. Souter to supplement the warrant, as he cannot in fact know by whom it was issued.

III. All description of the person to be captured is omitted, for there is nothing in the warrant to show what James Hastings is meant by it. In *Rex v. Hood (d)* the omission of the Christian name of the person to be apprehended was held to vitiate the warrant. Blanks left in the warrant, as here, for the description of the person to be apprehended to be inserted by the officer executing it, cannot afterwards be filled up: 2 Hale P. C. 114; Foster 312.

IV. The offence must be described with reasonable certainty, not, as here, by a mere formal statement, from which neither the Court nor the prisoner can collect any information. The warrant should have stated, for example, the name of the public servant said to have been bribed so that the prisoner
 (a) 11 W. Rep. 730 (b) 2 Strange R. 934. (c) Ld. Raym R. 978

(d) 1 Mood. Cr. Cas. 281.

might be informed for what alleged act he was arrested:
Hale P. C. 584.

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The jealousy with which the Courts regard any want of formality in a warrant, is well exemplified in the case of *Howard v. Gossett (e)* (where all the authorities are referred to)—a case which was followed by the Exchequer Chamber in Ireland in the recent case of *Hodgens v. Poe (f)*. As all intendment will be made against, and so intendment will be made in favour of, the legality of a warrant issued by an inferior Court, I submit that the warrant in the present case is altogether illegal, and that the prisoner is entitled to his discharge.

Sargent, J.:—In this case, I am of opinion that the prisoner is not in custody under a valid and legal warrant. The Commissioner of Police, to whom the writ of *habeas corpus* was directed, has brought up the body of the prisoner, and has produced before the Court the warrant under which, I must presume, he arrested the prisoner. That warrant is directed to the Commissioner of Police at Bombay, and runs as follows:—(His Lordship read the warrant and the endorsement as to bail upon it, and proceeded.)

The first objection that has been taken to that instrument is that it is without a seal. It was alleged that at common law a seal was essential to the validity of a warrant, and that would appear to be so according to the authorities. In the present case, however, the Magistrate, who issued this warrant, was not acting under the common law but under the provisions of a statute, namely, Act XXV. of 1861. The form of the warrant and its requisites are stated in Section 76 of that Act which enacts that "every warrant issued by a Magistrate shall be in writing and shall be signed and sealed by such Magistrate and shall be in the form given in the Appendix or to the like effect." Now, having regard to the opinion that has, as I have said, been the opinion generally entertained by the Judges in England that a seal was essential at common law to the validity of a warrant, and that it is

(e) 14 L. J. Q. B. 367; S. C. 10 Q. B. 359.

(f) 2 Ir. Rep. C. L. 52; S. C. 16 W. Rep. 224.

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expressly provided in the section I have just referred to, that a warrant shall be sealed, I should hesitate much before coming to the conclusion that a seal is not essential to the validity of a warrant issued under the Code of Criminal Procedure. The reason for requiring a seal seems to be that the attaching of a seal shows that the instrument, to which it is attached, has not been issued without due deliberation as well of course as to prove the authenticity of the instrument. Upon this ground alone, I should have had great difficulty in saying that the warrant in the present case is a valid one.

There is, however, another objection put forward to its validity to which I attach even greater force. The warrant authorizes the committal of James Hastings, without giving any description, whatever, as to what James Hastings is indicated thereby. The form of warrant given in the Appendix to the Code runs thus:—

“To _____ (*name and designation of the person or persons who are to execute the warrant*),

Whereas _____ of _____ stands charged with the offence of (*state the offence*): You are hereby directed to apprehend the said _____ and to produce him before me.

Herein fail not.

(*signature and seal*).”

The warrant in question runs thus: “Whereas James Hastings stands charged,” &c., without, in any way, indicating what James Hastings is meant thereby. Under a warrant in this form, if it were held to be a legal and valid warrant, the Commissioner of Police would be justified in arresting any one of that name. In *Hood's case* the Christian name only of the person arrested was omitted, but a full description was given of him. The warrant there was “To take the body of———Hood of the hamlet of Bemerton in the Parish of Fugglestone, St. Peter, in the same county by whatsoever name he may be called, or known, the son of Samuel Hood to answer,” &c., and in that case the Judges were unanimously of opinion that the warrant was bad. That case was decided comparatively recently by Lord

Tenterden and all the other Judges, with the exception of three, and the Judges who sat were unanimously of opinion that the warrant was bad, because it omitted the Christain name. It was said it should have assigned some reason for the omission and have given some distinguishing particular of George Hood. I think I am bound to follow the principle involved in that ruling, which is that a warrant should contain a distinct and unequivocal intimation to the person that he is the individual meant to be apprehended and must surrender to the officers; and this too, the more especially, as the form of warrant provided by the code requires that his residence should be inserted. The issuing of general warrants is, it is well known, illegal, and this, though not properly speaking a general warrant, which means a warrant to apprehend all persons committing a particular offence or class of offences, is, however, of such a general nature as to justify the police in arresting any person of the name of James Hastings, whoever he may be, or wherever he may be found, the number of persons liable to be arrested under it being limited only by the limit to the number of persons bearing that name. The warrant in this case is, in my opinion, far more general than was the warrant in *Hood's case*, and I am, therefore, of opinion that it is bad.

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What I have said is sufficient to dispose of this return, but there were other objections taken to the validity of the warrant upon which I may say a few words. It was objected that the official character of the person signing the warrant did not appear upon the face of it; but I do not think that objection of itself can be supported. It is admitted that the omission might be supplied *abunde*, and the warrant states that the person signing it was a Magistrate. There is nothing however, to show where he is a Magistrate, or where the warrant was signed, and as Section 84 requires that when the person is arrested he shall (if bail is not taken) be forwarded to the Magistrate by whom the warrant was issued, it is plain that there is no certainty as to where the prisoner is to be sent, or before whom, as there may be more Magistrate than one, or even several, of the same

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name as the signing Magistrate. I think, therefore, that Section 84 shows that the place where the Magistrate signs should appear on the warrant. This view is borne out by the form given in the Act which leaves a space for the designation of the person before whom the prisoner is to be brought.

As to the objection taken to the offence not being described with sufficient particularity, I think it is not well founded. The technical description of the offence is given and the form seems to contemplate that being sufficient.

For the reasons I have stated, I think it is my duty to hold that this is not a valid warrant. No good grounds have been shown for detaining the prisoner in custody. He must, therefore, be discharged.

February 7.

[APPELLATE CRIMINAL JURISDICTION.]

Miscellaneous Petition.

GANPRASÁD bin SOBHÁRAM*Petitioner.*

Crim. Proc. Code Sections 308, 404—Judicial proceeding—Review.

An order under Section 308 of the Code of Criminal Procedure is a judicial proceeding within the meaning of Section 404 of that Code and is, therefore, open to review by the High Court under its extraordinary jurisdiction, when an error in law is committed.

Ashburner v. Keshav (a) on this point overruled, and *The Collector of Hoogly v. Tarak Nath Mukhopadhyaya (b)* followed.

THE following are the facts of the case:—

About three years ago, the petitioner, Ganprasád erected steps to his house in "Shukravár Peth" in the town of Sholápur, and paid to the Municipality of the place the sum of Rs. 130-8-0 for that and other purposes. On the 30th November 1870, the Municipality sought to remove the steps in consequence of which Ganprasád sued the Municipality and, on the 8th February 1871, obtained a decree enjoining the Municipality from removing the steps.

(a) 4 Bom. H. C. Rep. A.C.J. 150. (b) 7 Beng. Law Rep. 449.