consider the sufficiency or insufficiency of the evidence in relation to the verdict (1).

Attorney for the Crown: The *Government Solicitor* Mr. *Sanderson.*

Attorney for the prisoner: Mr. *Carruthers.*

APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, Mr. Justice Pontifex, and Mr. Justice Morris.

THE QUEEN *v.* ZUHIRUDDIN AND OTHERS.

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March 23.

Criminal Procedure Code (Act X of 1872*), s.* 64*—Power of Judge acting in English Department.*

An application for the transfer of a case under s. 64 of the Criminal Procedure Code should be made, not by letter to the English Department of the High Court, but before the Court in its judicial capacity, and should be supported by affidavits, or affirmation in the usual way.

THE Assistant Magistrate of Patna by an order dated the 10th of February 1876, committed the accused for trial by the Sessions Judge of Patna, on the charge of having on the 5th of June 1875 committed murder and cognate offences, alleging in the order of commitment that the delay in bringing them to justice was caused by the undue influence exercised by the accused in the district. On this ground he applied, through the District Magistrate, to the High Court for an order under s. 64 of Act X of 1872 transferring the case to some other district. A copy of the grounds of commitment was furnished

(1) The Counsel for the prisoner then went through the evidence to show that it was insufficient, apart from the confession, to justify the conviction being upheld. A certificate by a majority of the jury who tried the case, to the effect that if the confession had not been in evidence they would have given a verdict of acquittal, was tendered, but was rejected by the Court. The Court took time to consider their judgment, and eventually upheld the conviction on the evidence.

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to the accused on the 20th of February. The application to the High Court to transfer the case was made by the District Magistrate by letter directed to the Registrar of the High Court, who placed it before Jackson, J., sitting in the English Department, who thereupon, without notice to the accused, made an order transferring the case from the Sessions Judge of Patna to the Sessions Judge of Shahabad. The trial before the Sessions Judge of Patna would have been by a jury, while that at the Sessions Court at Shahabad would be by the Judge with assessors.

On the above facts, *Mr. Evans* applied for a rule calling on the Crown to shew cause why the order should not be quashed on the ground that it had been made without jurisdiction, and was not a valid exercise of any power vested in the Court, and moreover was made without notice to the accused, and without any proper application to the High Court on proper and sufficient grounds.

The application was made before GARTH, C.J., and PONTIFEX, J., who ordered a rule to be issued in terms of the application.

Mr. *Macrae* (The *Junior Government Pleader* Baboo *Juggodanund Mookerjee* with him) on behalf of the Crown now appeared to show cause, and contended that there was no necessity for giving any notice to the accused before making the order, no such procedure having been suggested by the Legislature : and after referring to s. 297 of the Criminal Procedure Code (Act X of 1872), which authorizes the High Court to commit for trial an accused person improperly discharged when such matter should "come to its knowledge" when such person had not the right to be heard, argued, that it might fairly be contended that the High Court having such large powers, the Legislature did not require notice to be given in the lesser matter of transferring cases. [GARTH, C.J.—When an order, if made, will affect an accused person, I certainly think he should have notice before it is made. PONTIFEX, J.—In cases coming before the High Court under s. 297 of the Criminal Procedure Code, the evidence has at a former stage already been taken in the presence of the

accused person.] The learned Counsel further argued from the fact, that the power of transferring cases under ss. 63 and 64 was possessed by the Governor General in Council and by the Lieutenant-Governor, for whom it would be impossible to follow the procedure demanded on behalf of the prisoners, the transfer was made administratively. By s. 13 of the Charter Act, the powers of the High Court may be exercised by one Judge under the rules of 4th June 1867; see Broughton's Civil Procedure Code, p. 704. Therefore, if the matter be non-judicial and affecting the administrative and executive authority only, such a Judge has power to dispose of it himself. [PONTIFEX, J.—Will cl. 36 of Letters Patent enable a single Judge to perform functions under s. 64 of Act X of 1872?] Cl. 13 confers judicial powers on the High Court; cl. 15 confers administrative power; the power to transfer cases is conferred by the latter section as belonging to the administrative rather than judicial acts of the Court.

Mr. *Woodroffe* (Mr. *Evans* and Moonshee *Mahomed Yusoof* with him) in support of the rule.—Even if in point of form the letter sent by the Registrar be an order of the High Court, the High Court cannot issue an order administratively, and if it could so issue it, the English Department has not the power to issue such an order; the High Court, when it makes an order under s. 64, acts judicially and not administratively. The Legislature could not have intended to confer power of such an unparalleled character as to allow it in certain cases to act both administratively and judicially. S. 520 of the Criminal Procedure Code is the only section under which the High Court has power to make an order not judicial. The considerations which would move the Governor-General in Council are different from those which would move the High Court. No argument can be deduced from ss. 63 and 64A to support the contention that the powers exercised by the High Court are other than judicial proceedings. There is nothing to show that an order under s. 64, made by High Court, is anything other than a judicial order. Any person liable to be prejudicially affected by an act of the Legislature has the right to have an opportunity of defending himself, unless such right has been expressly restricted; see

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Maxwell on the Interpretation of Statutes, p. 325. The powers of revision given to the High Court by s. 297 are with reference to matters judicial; see *The Queen* v. *Bundoo* (1). The Court can only act on matter brought before the Court in the regular way by the prosecution or by the defence; not on information obtained from other sources, as newspapers, letters, &c. Applications in other cases have been made by the accused for transfer of cases, but these have always been treated judicially. Some of them have been so treated by Macpherson, J. and Pontifex, J. We have not been able to discover a single instance of an application such as this being made by the accused person to the English Department. [JACKSON, J., referred to three cases in which the application was made on behalf of the accused to the English Department.] Those are cases where the applications were made possibly in the interest of the accused, but not by him, but by the Magistrate on account of his being connected with the case as either a witness or prosecutor. The learned Counsel referred to the *Queen* v. *Pogose* (2), a case in which an application made by the Judge of Dacca to the English Department to transfer the case from that district, had been refused on the ground that it could not be dealt with administratively, and asked the Court to send for the papers in the case.

On the re-assembling of the Court on the following day, the following judgments were delivered:—

GARTH, C.J.—I am happy to say, that since last evening, some papers have been discovered, which will render any further discussion of this rule unnecessary.

It appears, that in 1869, in a case which in its circumstances very closely resembled the present, it was decided by no less than nine Judges of this Court, that the proper course was to apply to the Court, sitting in its judicial capacity upon affidavits, in the usual way; and I am extremely glad to find that no less distinguished a Judge than Mr. Justice Louis Jackson, was one of the Judges who took part in that decision (3).

(1) 22 W. R., Cr., 67.

(2) Not reported.

(3) This was the case of *The Queen* v. *Pogose* referred to by Mr. *Woodroffe*.

An application in that case was made by Mr. Herschel, the Officiating Sessions Judge of Dacca, to the Registrar of this Court, suggesting that an order should be obtained for the transfer of the proceedings to the High Court for trial. I will read his letter, dated the 11th of June 1869.

"I have the honor to request that you will lay before the Hon'ble Judges of the High Court the following circumstances and solicit orders thereon for me. The Magistrate of Dacca has committed the four principal Armenian residents of this city on a charge of misappropriating a large sum of money, the property of the wealthiest Armenian of Dacca, on his decease. The charge is brought on behalf of Government on the motion of the Educational Department, who claim the money as intended for a school. Technically the Government is prosecutor also under s. 68. The case is as important a case as well could occur in the eyes of the educated classes of Dacca; and the decision of it is naturally looked forward to with great interest. But it appears to me advisable that it should be tried at Calcutta, and not here. My Jury list is very ill adapted for such a case (1).

Upon this letter being received by the Registrar, it appears to have been laid before the Chief Justice, Sir Barnes Peacock, who recorded upon it, the following minute:—"It appears to me that the Court ought not to interfere upon the application of the Sessions Judge made by letter. If Government (or the prosecutor, if the case is not prosecuted by Government), or any of the accused think fit to apply to the Court by motion supported by affidavit or affirmation, the Court will decide what ought to be done.—June 16th, 1869. (Signed) B. Peacock." This view of the learned Chief Justice was concurred in by the Judges of the Court as under: "I agree with the Chief Justice."—J. P. Norman. "And I."—C. Hobhouse.—G. Loch. —H. V. Bayley. "I agree."—D. N. Mitter. "Seen."—W. Markby.—E. Jackson. And further it was agreed to, as I have

(1) The letter then went into details to show the difficulty of obtaining a proper jury in the district to try the case, and suggested that the case should be transferred to the file of the High Court.

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already mentioned, by my learned colleague, Mr. Justice Louis Jackson.

This decision having been arrived at in 1869, it appears to us to set the matter at rest; and I think that Mr. Macrae, on the part of Government, will feel that he cannot with propriety contest the point further.

Mr. *Macrae* assented.

JACKSON, J.—I wish to add a few words by way of explanation of what seems to be an inconsistency on my part.

My acquiescence in the course taken on that occasion was in this degree marked, that while the other Judges had merely attached their initials in token of their concurrence, I wrote a separate note, and that note is in these words: "I quite agree with the Chief Justice that such an application could only be entertained, if made in the way stated by him. I take the opportunity of pointing out that it has been a very common practice for Sessions Judges to make recommendations for the transfer of cases from one district to another by letter, and that cases have often been so removed by a mere letter based on such recommendations. It may be worth considering, whether some rule ought not to be laid down for dealing with such applications. The same thing also happens in respect of civil cases."

It would seem, therefore, that I not only concurred in that view, but considered it desirable that the Court should lay down a formal rule, which should regulate the procedure in such cases, and should be a notice and a guidance to Judges and Magistrates when they should think fit to make such references in future. Immediately afterwards I left the country and was absent for four or five months, during which time no one took any steps in the matter. The result was that no formal rule was made, and this case appears to have passed out of sight. Two years afterwards I had the honor to succeed to the charge of the English Department, and found that, notwithstanding this case, the practice continued to be such as it had formerly been, and therefore the course I took in this case was

in strict conformity to the old practice which had not been departed from, notwithstanding this case.

I do not hesitate to say that the procedure suggested by Sir B. Peacock is the proper one when there are parties concerned; but the practice being such as I have stated, I consider myself justified in making the order which I did.

GARTH, C.J.—I desire to add that I personally do not regret that this matter has been thoroughly ventilated and discussed in open Court. It is extremely desirable that the public should fully understand that in this country there is the same law for the Government as for the subject; and that there is not one course of practice for the Crown, and another for the prisoner. Wherever the rights of the subject are concerned, it is quite right that the matter should be dealt with by us in open Court in our judicial capacity, and that each application should be made, supported by affidavit or affirmation, in the regular way.

In the present case the rule will be made absolute to set aside the order complained of, and the Crown will be at liberty, if so advised, to make a substantive application to the Court for the transfer of the case to some other district.

MACPHERSON, J.—I concur in thinking that the Crown has shown no good cause against the rule; and that the rule should be made absolute.

PONTIFEX, J.—I also agree.

MORRIS, J.—I also agree.

Rule absolute.