# ORIGINAL CRIMINAL.

*Before Mr. Justice White.*

1877
*March* 19
& 22.

IN THE MATTER OF THE EMPRESS OF INDIA ON THE PROSECUTION OF MALCOLM *v.* GASPER AND OTHERS.

*High Courts' Criminal Procedure Act (X of* 1875), *s.* 147—*Transfer of Case before Police Magistrate to High Court—Power to issue Mandamus.*

A charge was made against the accused of using criminal force under s. 141 of the Penal Code. The Police Magistrate heard the evidence for the prosecution, and without disbelieving it, decided it did not amount to the offence charged. *Held* that, assuming that an error of law had been committed, the High Court had no power to issue a *mandamus* to the Magistrate to commit the defendants ; it was not a case where the Magistrate had declined jurisdiction ; he had exercised his jurisdiction and heard the case. *Held* also, it was not a case which the Court could transfer under s. 147 of the High Courts' Criminal Procedure Act.

THIS was an application under s. 147 of the High Courts' Criminal Procedure Act (X of 1875), for a rule calling on Mr. Dickens, one of the Police Magistrates of Calcutta, to show cause why a case should not be transferred to the High Court for hearing and final determination, or for a *mandamus* to compel the Magistrate to commit.

The defendants were charged before the Magistrate, under s. 141 of the Penal Code, with being members of an unlawful assembly, and, in pursuance of the common object of such assembly, with having used criminal force, or show of criminal force, and ejected the prosecutor from the Armenian Church, of which he was in possession. The Magistrate took evidence in the case, and came to the conclusion on that evidence, that no offence had been made out. When the application was first made, the Court suggested that it had no power, under the circumstances, to grant it, and asked for an authority to show that, in a similar case, the Court of Queen's Bench or this Court would issue a *mandamus*, or grant a *certiorari*, and gave leave to renew the application.

Mr. *Phillips* (Mr. *G. Gregory* with him), renewing the application, said, that he had been unable to find any case in which the Court of Queen's Bench had issued a *mandamus* ordering the Justices to commit; but there was a reason for that remedy not being given in England, which did not exist here. The Queen's Bench does not grant a *mandamus* until all the other remedies open to the applicant have been exhausted. Now, in England, in such a case as this, the remedy would be to go before a grand jury; therefore a *mandamus* would not lie. But in this country the grand jury has been abolished, and there being no other remedy, a *mandamus* will issue, the Court having the powers, in that respect, of the Court of Queen's Bench. The Magistrate did not disbelieve the evidence, for he stopped the case for the prosecution. He considers that, admitting the facts proved to be true, they do not constitute any offence; he has, in other words, mistaken the law. Where a *primâ facie* case is made out, the Magistrate is bound to commit—Burn's Justice of the Peace, Vol. I., p. 773. He has no further discretion. [WHITE, J.—Suppose in such a case as this in England you went before a grand jury they might throw out the bill. You might, indeed, go before a second grand jury; but they also might ignore the bill: would the Queen's Bench compel the grand jury to find a true bill? And if not, the remedy you mention is very incomplete. I doubt whether the reason why the Queen's Bench won't grant a *mandamus*, is because there is a remedy by going before the grand jury.] It is submitted that it is; and that reason, the grand jury having been abolished, not existing here, this Court has power to issue a *mandamus*. In cases where there is no other remedy the Queen's Bench does grant it. In a case where there is no other remedy, a Magistrate can be ordered to grant a summons; see *The King* v. *The Justices of Kent* (1). [WHITE, J.—Here the Magistrate has exercised his jurisdiction, and dismissed the case: that seems to me to be your difficulty.] His action amounts to saying that the law does not give him power to commit, because there is no offence,—that is, he says he has no jurisdiction; in other words,

(1) 14 East, 395.

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declines jurisdiction. See 9 Geo. IV., c. 74, s. 2, as to his being bound to commit. A somewhat similar case is the refusal to issue a summons, in which case the Queen's Bench can make an order that the summons be issued; see *The Queen* v. *Adamson* (1). This is a decision on a preliminary point, not a case which the Magistrate has heard and decided. It is a matter of law as to which he has no discretion. It is similar to a case of refusal of summons, which is only a way of putting a case in train for hearing. [WHITE, J.—The Magistrate appears to me to have exercised his jurisdiction, not to have declined it. It differs from a refusal to issue a summons. He has heard the case.] He has dealt with the case in such a way as amounts to declining jurisdiction. A *primâ facie* case was made out for the issue of a summons, and the Magistrate refused to issue it. [WHITE, J.—I have no more power than the Court of Queen's Bench, and you have not shown me any case in which that Court has granted a *mandamus* in a case like this. I think it is only where there is another effective remedy that the Queen's Bench declines to issue a *mandamus*.] Even taking that to be so, it is submitted it would issue here, as there is no other effective remedy.

As to the application under s. 147, the fact that the grand jury has been abolished ought to lead the Court to put as wide a construction on the section as is possible. S. 147 differs from the old law, and is intended to have a wider scope. In 33 Geo. III., c. 52, s. 153, which was the former law, there is nothing to limit the interference of the High Court to orders for convictions. In this country appeals from acquittals are allowed, and to refuse to interfere, simply because it is a case of acquittal, would be narrowing the law to what it is in England, where appeals from acquittals are not allowed.

As to the facts of this case constituting an offence under s. 141 of the Penal Code, it is submitted they do. [WHITE, J.—On this branch of your application, one difficulty is, what am I to quash or affirm if I do interfere under the section?] The order of discharge may be quashed, and this Court may hear and determine the case itself. The order made by this Court

(1) 1 Q. B. D., 201, *per* Cockburn, C.J., at p. 205.

must be made on the merits. [WHITE, J.—Does not that show that the proceeding intended by s. 147 was some final proceeding or order of the Criminal Court?] It is submitted that it only shows that there must be some substantial matter to be adjudicated upon after the transfer.

WHITE, J.—I have, in the course of the argument, stated my views so fully that it is unnecessary to do more than recapitulate the reasons for my decision.

Mr. Phillips, on behalf of the prosecution, applies, on affidavit, for one of two orders—either for a rule under s. 147 of the High Courts' Criminal Procedure Act (X of 1875), calling on the Magistrate to show cause why these proceedings should not be transferred to this Court for hearing and final determination; or for a *mandamus* to compel the Magistrate to commit on a charge of being a member of an unlawful assembly under s. 141 of the Penal Code.

When the case came before me on the first occasion, I was informed that the Police Magistrate, having heard the evidence, did not disbelieve the facts proved, but thought that they did not amount to the offence with which the defendants were charged, and, therefore, declined to commit them for trial. When I heard that such was the nature of the case, I requested Mr. Phillips to refer me to some authority for my granting his application. He has not brought before me, however, any authority which shows that either the Court of Queen's Bench, or this Court, has ever issued a *mandamus*, or granted a *certiorari*, in a case similar to the present one. He has, indeed, referred me to two cases, *The Queen* v. *Adamson* (1) and *The King* v. *The Justices of Kent* (2), in which the Court of Queen's Bench granted a writ; in the first case, ordering the Justices to hear and determine a case which they had refused to hear; and in the second case, ordering them to issue a summons, which they had refused to issue. But both these cases, when examined, show that the Court of Queen's Bench does not issue a *mandamus* in such cases unless the inferior Court has actually declined jurisdiction, or has acted under

(1) [illegible] D., 201.

(2) 14 East, 395.

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circumstances which amount practically to declining jurisdiction. Now in this case the Magistrate has not declined to exercise jurisdiction. He has heard the evidence in the case, and has come to the conclusion that no offence under the Penal Code has been committed. He has, in fact, exercised his jurisdiction, and decided the case in favour of the defendants. This is sufficient to dispose of the first branch of Mr. Phillips' application. Quite irrespective, however, of this, I may state that a *mandamus* could not issue in the form asked for; if it issued at all, it would go not to order the Magistrate to commit, but to order him to hear the case again, and upon a sufficient case being made out, then to commit.

As to the second branch of the application, which is to transfer the case to this Court under s. 147 of Act X of 1875, I think I am equally without power to deal with the case, in the way I am asked to do. That section provides, that "whenever it appears to the High Court that the direction hereinafter mentioned will promote the ends of justice, it may direct the transfer to itself of any particular case, and shall have power to determine the case so transferred, and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form, but on the merits only." The present case is not, I think, within the purview of the section. If I transferred it, I should be doing so not for the purpose of quashing or affirming a conviction or other proceeding, but for the purpose of hearing the case, taking the evidence of the witnesses, and myself determining whether a case for committal had been made out or not. I think the section is not wide enough to enable me to do that, and I should be extending the section beyond the intention of the Legislature if I put it in force to transfer such a case as this.

I can well imagine that the refusal of a Magistrate to commit may now and then result in a grievous failure of justice, but if the Legislature intended to provide for such a case, the Court should have been specifically armed with power to deal with such case. I cannot infer such a power in the absence of express words. I am, therefore, unable to grant this applica-

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tion. I have assumed throughout these remarks that an error of law has been committed, but I have made that assumption only for the purposes of the argument. Considering the law bearing on the application to be such as I have stated, I have thought it unnecessary to hear the affidavit. The refusal to commit is not tantamount to an acquittal, and the prosecution can, if they choose, go before the Magistrate again, though I am by no means saying they ought to do so. The application must be refused (1).

*Application refused.*

Attorney for the applicant: Mr. *Leslie.*

## APPELLATE CIVIL.

*Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Ainslie.*

DEBI DUTT SAHOO (PLAINTIFF) *v.* SUBODRA BIBEE AND OTHERS (DEFENDANTS).*

1876
*June 2.*

*Act XL of* 1858, *s.* 18—*Act VIII of* 1859, *ss.* 2 *and* 3—*Mortgage by Administrator of a minor's property—Purchaser with notice, Title of—Duties of Purchaser.*

A mortgage of the property of a minor made by the Administrator appointed under Act XL of 1858, is invalid, unless the sanction of the Court has been previously obtained under s. 18 of the Act.

Where the administrator was sued, as representing the minor, by the mortgagee, and made no defence to the suit, and the property was sold under a decree so obtained to the mortgagee, by whom it was again sold to a third person, who knew that the administrator had executed the mortgage in that capacity,—*held*, that the decree did not protect the mortgagee who purchased at the Court sale, nor her vendee, from suit by the minor for recovery of the property.

THE plaintiff in this suit was one of four sons of one Imrit Lall Sahoo, a trader, who died in December, 1863, intestate. The plaintiff being a minor, his brother Rameswar Dutt obtained, under s. 7 of Act XL of 1858, a certificate of adminis-

* Regular Appeal, No. 65 of 1875, against a decree of W. DaCosta, Esq., Subordinate Judge of Zilla Sarun, dated the 18th of January, 1875.

(1) See *Corporation of Calcutta* v. *Bheecunram Napit, post.*