(1913) 09 CAL CK 0005

Calcutta High Court

Case No: No. 128 of 1913

Gulli Sahu and Another		APPELLANT
	Vs	
King-Emperor		RESPONDENT

Date of Decision: Sept. 21, 1913

Judgement

1. This is a Reference by the Sessions Judge of Darbhanga under sec. 438, Cr. P. C., recommending for revision an order passed by the Subdivisional Magistrate of Madhubani, directing the surrender of two alleged fugitive offenders, viz., Gulli Sahu and Gobind Sahu to the Nepal authorities. In Bhador 1966 (1909) Gulli Sahu and Gobind Sahu with 4 other persons are said to have assaulted one Peary Goar under the orders of a zemindar, one Jia Lal, in village Malini within the territory of Nepal. Seven days after the assault Peary Goar is alleged to have died. His widow Musammat Bhagwatia laid a complaint before the Nepal authorities on 26th Jeth 1967. Two out of the 4 other persons were tried in Nepal and convicted. One of the two was sentenced to be hanged and the other sentenced to transportation for life. On the 29th January 1912, the Sub-Inspector of Phulpras Police-station, within the Subdivision of Madhubani, sent an enquiry slip through the Subdivisional officer 10 the Lieutenant of Hanumannagar in Nepal, enquiring if one Gulli Sahu was wanted by the authorities of Nepal in the case of the murder of a Goala. The Lieutenant whose official position corresponds to that of a Subdivisional officer in British India replied on the 22nd February 1912 that Gulli Sahu was accused in that case and asked for his arrest promising to send proof of criminality and nationality. On the 9th March 1912, the Subdivisional Magistrate of Madhubani issued a warrant of arrest against Gulli Sahu who, on surrendering before the Magistrate on 18th November 1912, was released on bail by that Magistrate. On the 12th January 1913 the Lieutenant of Hanumannagar sent the evidence of criminality and nationality to the Subdivisional Magistrate and requested that Gobind Sahu should also be arrested. On 3rd March 1913 Gobind Sahu was arrested and released on bail. After examining witnesses for the prosecution and the defence, the Subdivisional

Magistrate by his judgment, dated the 20th April 1913, directed the surrender of the accused Gulli Sahu and Gobind Sahu to the Nepal authorities. The Magistrate concludes his judgment thus :--"The accused, I hold, have committed an offence and are fugitives from justice and should therefore be surrendered to meet the charge."

2. The learned Judge in making this reference to us points out--(1) that there is a conflict of evidence as to the nationality of the accused, (2) that while there is no direct proof that Peary Goar died in consequence of the assault, there is a good deal of evidence that he died of natural causes, the evidence of the widow being to that effect, (3) that there is neither proof nor finding that an extradition offence has been committed, and (4) that the evidence if believed, at best makes out a case of grievous, if not of simple, hurt only. The learned Judge further points out that although under the Indian Extradition Act any form of hurt is an extradition offence, this case, by virtue of sec. 18 of the Act is governed by the Treaties between the British Government and the Government of Nepal, and does not disclose any offence for which an extradition order can be passed.

3. The learned Deputy Legal Remembrancer on behalf of the Crown urges that regard being had to the provisions of sec. 15 of the Indian Extradition Act, it is the Government of India or the Local Government alone and not the High Court that have the power to discharge the person for whose arrest warrant has been issued under the Act. In this connection it is necessary to examine the provision of the law under which the Magistrate has purported to act. Is is frankly admitted on behalf of the Crown that sec. 7 of the Act is not the Magistrate''s authority for his proceedings, but it is urged that his action is covered by the provisions of sec. 10 of the Act. The portions of that section material to this case are contained in sub-secs. (1) and (2) that run thus :--

(1) If it appears to any Magistrate of the first class or any Magistrate empowered by the Local Government in this behalf that a person within the local limits of his jurisdiction is accused or suspected of having committed an offence in any State not being a Foreign State and that such person may lawfully be surrendered to such State or that a warrant may be issued for his arrest under sec. 7, the Magistrate may, if he thinks fit, issue a warrant for the arrest of such person on such information or complaint and on such evidence as would, in his opinion, justify the issue of a warrant, if the offence had been committed within the local limits of his jurisdiction.

(2) The Magistrate shall forthwith report the issue of a warrant under this section, if the offence appears or is alleged to nave been committed in the territories of a State for which there is a Political Agent, to such Political Agent and in other cases to the Local Government.

4. Bearing the above provisions of the law in mind the order of the Magistrate is open to attack on several grounds. Firstly, he issued the warrant, at least in the case

of Gulli Sahu, on mere information without any evidence. Secondly, he has not reported the issue of the warrants to the Political Agent, there being one in Nepal. Thirdly, he has made an enquiry into the case without a warrant or warrants issued by the Political Agent in or for the Nepal State. Fourthly, he has ordered the surrender of the accused on a procedure not known to the Extradition Act.

5. It is true that sec. 15 of the Act ousts the jurisdiction of this Court to enquire into the propriety of a warrant issued under Chap. III, but where the order of the Magistrate is sought to be justified under an authority supposed to be derived from the law, but is in fact without jurisdiction, not being sanctioned by it, we cannot but assume that the Magistrate has acted in his general jurisdiction and as such his order is revisable by this Court and liable to be set aside at the instance of the party whose liberty is affected by it.

6. In the view we have taken of the law in this case, we are supported by similar views expressed by learned Judges of the Bombay High Court and the Punjab Chief Court, respectively, in the cases Emperor v. Hussainally Niazally 7 Bom. L. R. 463 at p. 467 (1905) and In the matter of Akadyer 21 Punj. Rec. [1886] Cr. 45 at p. 52.

7. Before concluding this judgment we desire to quote the following passage from the judgment of the Privy Council delivered by the Lord Justice Mellish in Attorney-General for the Colony of Hongkong v. Kwok a Sing L. R. 5 P. C. 179 at p. 199 (1873) which Magistrates dealing with such cases may profitably bear in mind :

Suppose that a subject of China kills an Englishman within English territory or on board an English ship, under circumstances which according to English law might amount to manslaughter only, could it possibly be right for the English Government to surrender such a person to the Chinese Government to be tried according to Chinese law to which the distinction between murder and manslaughter may be wholly unknown ?

We accept the reference of the learned Judge made to us for the reasons indicated in this order and we direct that the accused be discharged.