
(1871) 05 CAL CK 0008

Calcutta High Court

Case No: None

The Queen

APPELLANT

Vs

Ameer Khan and
Others

RESPONDENT

Date of Decision: May 11, 1871

Judgement

Phear, J.

The two prisoners on whose behalf the present application to this Court is made are now awaiting their trial before the Sessions Court at Patna on various charges which the Joint Magistrate at Patna, after duly holding a preliminary investigation, has preferred against them; in other words, the cases of the prisoners are criminal cases pending for trial at the Sessions Court at Patna, and the object of the application is to obtain the transfer of the case from the Sessions Court to this Court for trial. The transfer is sought under the provisions of clause 29 of the Letters Patent of this Court (reads).

2. The learned Advocate-General, on behalf of the prosecution, in the first place, urges that this clause (29) does not confer on the Court the power to make such a transfer as this. The Advocate-General, as I understand his argument, urges that this Court, in its character of a Court exercising criminal jurisdiction over the Town of Calcutta, is a distinct Court, sui generis, and is not so related to the Criminal Courts of the mofussil as to fall within the scope of the words of clause 29, any other Court of equal or superior jurisdiction." It appears to me that we cannot give effect to this argument without sanctioning a distinction of parts in the High Court which has no reality, and thus giving currency to an error which may become fertile in mischievous results. The High Court is endowed with extensive, I may say, exalted jurisdiction, embracing in its ambit various subjects or topics, and described in the Letters Patent under various heads. The Judges of whom the Court is composed are numerous, and the Legislature has empowered the Court by its own rules (I am now quoting section 13 of the Charter Act) to provide for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges of the said High Court, of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due

administration of justice." The Court has availed itself of this power, and does exercise its power as we know, by single Judges, and Division Courts consisting of two or more Judges. The rules of the Court by which this is done are perhaps little systematic, and certainly have not been framed with any view to the particular point upon which the present objection depends. It is not necessary for me now to discuss those rules, and I do not now propose in any way to review them. Nothing in them, however, as I understand them, gives favor to the present contention; for that would require that the effect of the rule should be to confer on each particular Bench of this Court a portion only of the jurisdiction of this Court. And it seems to me that there are only two ways in which this could be done,--namely, either by deputing to each Bench a portion of jurisdiction by express words of limitation, or by assigning to it work locally or otherwise defined, and delegating to it only so much and such limited jurisdiction as may be needed for that work. Now, assuredly the rules bearing on this matter have never been understood as operating in either of these directions. It is within our daily experience that a Division Bench of the Court, whose work is defined by local limits, takes up and disposes of work which in the same way belongs to another Bench. And in many other modes work is being constantly done without question, which, I apprehend, would be without authority and legal efficacy if the view which has been contended for before us were correct. And see what the result would be. The High Court rarely sits as a whole. Only once in the whole course of my experience has it done so. The result would be that, instead of one High Court, we should have a group of Courts, each of imperfect and ill-defined limited jurisdiction. This I think would offer every sort of opportunity for uncertainty, whether or not any particular matter of litigation had been decided by competent authority. This would be a wretched state of things, and one not likely to have been intended, but rather, I should say, very foreign to the mind of the Legislature which amalgamated the Sudder and Supreme Courts. And I think there is nothing in the words of section 13 of the Charter Act which would warrant such a limited deputation of jurisdiction to a Division Court in this fashion. I need not now say anything as to the distribution of work and as to the disposal by the Division Benches of the business which is actually brought before them, but I come, without any sort of hesitation, to the conclusion that this Court, when engaged in administering criminal justice within the District of Calcutta under its ordinary criminal jurisdiction, is none other than the High Court itself. It is the High Court discharging one of its proper functions; it is not merely the High Court in some, to me not very conceivable, inferior capacity. If this be so, the application to remove this criminal case from the Sessions Court at Patna into this Court to be tried by virtue of its criminal jurisdiction, seems to me to be an application made precisely within the words of clause 29. As regards the Sessions Court at Patna, the High Court is unquestionably a Court of superior jurisdiction. "Why, then, are we to say that we have not the power under that section to make the transfer which is sought?"

3. In the first place, the Advocate-General says that supposing the words of clause 29 are large enough to comprehend this Court, yet the situation of the section relatively to other sections is such that it cannot be reasonably supposed that those words were intended to

have the fullest signification. I thought that there was considerable force in Mr. Evans' answer to this objection, and a closer survey of the Letters Patent makes that answer more forcible than it appeared at first sight, because I think it very apparent that the different clauses of the Letters Patent have been very inartistically framed and put together, and in truth that the Letters were drawn without any great completeness of purpose.

4. But I am not even prepared to take the view that the clause authorizing the transfer of a criminal case into this Court would be inaptly placed in the position which clause 29 occupies. By the nature of the Advocate-General's argument, he admits that the clause is rightly placed for the purpose of giving power to this Court to transfer cases from one local District Court to another District Court. If that be so, I see nothing inapt in including in the same section a power to transfer to this Court. If the power to transfer to this Court is needed at all, it is needed for reasons, amongst others, which would render it right and proper to transfer cases from one local Court to another.

5. If, to take an instance, such reasons existed for the transfer from the District of the 24-Pergunnas into another district, why should the power to transfer it into this district for those reasons be absent? It seems to me to be quite unintelligible, for instance, to take the case given by the late Chief Justice in the case of [The Queen Vs. Nabadwip Chandra Goswami and Kushadhwaj Mandal](#) , that this Court should have the power of transferring the trial of criminal cases from the Court of the 24-Pergunnas to any other district of Bengal upon grounds of convenience, if convenience existed, and yet should not have the same power to remove the case into this Court across Circular Road even though the reasons of convenience were ten-fold stronger. It appears to me that there are large classes of cases in which the transfer of criminal trials to this Court might require to be made upon grounds exactly similar to those which would justify the transfer from one Mofussil Court to another. And if so, it does not seem strange that the power to transfer a case into this Court should be included in the same clause as that which gives the power to transfer cases from one Court into another. But then it was urged that clause 13 of the Letters Patent does give express power to remove a civil case from a Mofussil Civil Court to this Court for trial, in words altogether beyond any possible misapprehension. If, therefore, the framers of the Letters Patent intended this Court to possess the like power of removing a criminal case, why did not they say so with equal precision and expressness?

6. I am not sure that if there were nothing in the Letters Patent to qualify this argument, it ought to be allowed to cut down the natural operation of the words of clause 29. The power which is given to us in clause 29, whatever may be its proper extent, is unquestionably remedial in its nature; and I am disposed to think that this Court, the highest Court in this presidency, ought not to decline a remedial power which the words of its Letters Patent apparently give it, without the strongest possible grounds for thinking that these words were not intended to mean what they apparently do mean. But there is much in the Letters Patent, or perhaps I ought to say omitted from the Letters Patent,

which leads me to think that any argument drawn from the existence of clause 13 must be taken with very great qualification. Clause 13 provides for but one portion of the civil jurisdiction as compared with the other portions of the criminal jurisdiction which is dealt with by clause 29. Clause 13 is confined only to removing civil suits for trial; clause 29, in one comprehensive set of words, provides for the transfer of criminal cases from district to district, including, if the words are to be taken in their apparent sense, removal to this Court, and further gives powers to this Court to direct preliminary investigations--in other words, the institution of criminal suits--in any district. The sections, therefore, do not in my opinion admit of being closely compared. And, further, that which is left out of clause 13, and does not appear anywhere else in the Letters Patent, is nevertheless taken to be a power belonging to this Court, and to lie within its jurisdiction,--I mean the power to transfer civil cases from one District Court to another. This Court obtains that power under the general representation which it, so to speak, makes to the Sudder Court, and the power was given to the Sudder Court by the Civil Procedure Code; so that clause 13 and the Letters Patent are very defective if it were intended that all our powers should be found in the Letters Patent--defective, that is, as regards civil matters in an important particular which is supplied by clause 29 with regard to criminal matters. Or else, that which is put into clause 29 with regard to criminal matters is there of design. If the one is a defect due to inattention of the framers of the Letters Patent, the value and weight of the argument from clause 13, which depends altogether upon a supposition of the completeness of the Letters Patent, is very materially qualified. And if that which is inserted in clause 29 is put there intentionally, it is very important to observe that clause 29 is a reproduction of section 35 of the Criminal Procedure Code with a certain omission. So it stands thus, that the framers of the Letters Patent did not think it desirable to put into the Letters the enactment relating to the transfer of civil suits, thinking it sufficient where it stood in the Civil Procedure Code; but at the same time thought it proper to bring the corresponding enactment from the Criminal Procedure Code into the Letters Patent, making an alteration in it while they did so. And if that be the true version of what took place, the alteration is surely very significant. Section 35 says:--

It shall be competent to the Sudder Court to order the transfer of any criminal case or appeal from a Criminal Court subordinate to its authority, to any other such Criminal Court of equal or superior jurisdiction, or to order that any offence shall be enquired into or determined in any District, or division of a District, other than that in which the offence shall have been committed, whenever it shall appear to such Sudder Court that such order will promote the ends of justice, or tend to the general convenience of the parties or witnesses.

7. The clause, as it appears in the Letters Patent, does not contain the words subordinate to its authority" in the first part, or the word "such" in the latter part. Had these words been contained, they would have excluded this Court from the category of superior Courts referred to in clause 29, and therefore the reasonable inference from the omission of them is that this Court was not intended to be excluded.

8. It is no doubt singular that, if clause 29 of the Letters Patent does confer the general power which I think it does, section 24 should have been put into the Letters Patent, inasmuch as it appears to be little other than a particular instance of that general power. There are, however, provisions even in that section which under a nice discrimination might possibly distinguish the power there given, and prevent it from being strictly such a particular case as that to which I have referred. However this may be, having regard to the want of completeness of drafting which certainly is manifested in the Letters Patent, I do not think that even the presence of such a provision as that of clause 24 should be allowed much weight in the argument which I have already dwelt upon at some considerable length.

9. And, lastly, we have the express opinion of the late Chief Justice, the present Officiating Chief Justice, and Mr. Justice Markby, in [The Queen Vs. Nabadwip Chandra Goswami and Kushadhwaj Mandal](#) , all concurring in laying down that this Court does, under clause 29, possess the jurisdiction which is now invoked by Mr. Ingram's client. I thought it necessary at this length to give the reasons which have led me to concur in the opinion of these three Judges, because the question whether or not this Court possesses the power is one, I apprehend, of the greatest importance to the administration of justice in Bengal.

10. I come now to the facts upon which this application is made. The principal grounds upon which the application is based seem to me to be shortly these, namely:--

1. That in substance all the numerous charges preferred against the prisoners are allegations of criminal acts and conduct committed and exhibited at Calcutta, not at Patna.

2. That the course of the prosecution, whether intentionally or not, has been unfair, and that the selection of Patna as its place is certainly calculated to prejudice the prisoners.

3. That the case against the prisoners has been, and is being, put together by an organized set of Police agents who have had their quarters at Patna, and are using improper and illegal means to attain their object.

4. That the effect of the proceedings of this Police agency is to create at Patna such a feeling of dread and insecurity among persons likely to be called upon to give testimony there in the matter, as will prevent a trial held in that place from being fair, impartial, and satisfactory.

5. That several of the material witnesses for the defence refuse to go to Patna to give evidence.

6. That difficult points of law are likely to arise at the trial. These taken together did appear to me to afford very sufficient cause why the trial should be held in the superior Court at Calcutta, rather than the Sessions Court at Patna, and as the affidavits filed by

the applicants were undoubtedly strong enough to make out these grounds prima facie, the rule was issued by this Court.

11. In answer to this rule the prosecutor has filed affidavits denying to a very great extent the statements of the applicants relative to the conduct of the prosecutor and behaviour of the Police, I do not think it right that we should express anything in the shape of a judicial decision on the many issues of fact thus raised between the parties, or compare the relative truthfulness of the different deponents, on the one side and on the other, because we can hardly do this without the risk of giving rise unnecessarily to possible cause for prejudice at the ultimate trial. It seems to me sufficient now to say--to state very generally--that I have considered the affidavits on both sides with the gravest anxiety. I am very sensible of the weight which must of need be attached to the forcible arguments employed by Mr. Ingram, and I feel much the absence of former decisions upon the point, which might in so grave a matter as this afford a valuable guide to the proper decision of this Court. It appears to me that instances drawn from the practice of the Court of Queen's Bench in England with reference to the granting or withholding writs of certiorari to bring up an indictment from an inferior Court are not near enough--not nearly parallel enough--to this case, to afford us any real assistance in forming our judgment. In England, all criminal trials, except trials for small offences under summary procedure, are effected by jury--by a jury which I may say is drawn somewhat promiscuously from a not very high class of the population. There is, therefore, some risk that the impartiality of the tribunal so constituted should be affected by existing causes of popular feeling or excitement bearing on the matter to be tried. And then the verdict of this body is final without appeal. Any risk of miscarriage of this kind, by such a tribunal, if it is to be prevented at all, can only be prevented by removal to a better or less prejudiced tribunal for trial. Hence a comparatively small cause may possibly be found inducing the Court of Queen's Bench to remove criminal cases in England which might not be sufficient to render a removal necessary or justifiable under a different kind of procedure.

12. In the present case, the prisoners will be tried at Patna by a Judge assisted by Assessors of intelligence, and of respectable independent social position, and an appeal from the decision of the Sessions Court will lie to this Court, both upon fact and law. Bearing this in mind, I think the affidavits put in on behalf of the prosecution do appear so far to displace the case set up before us by the applicants, as to remove the grounds for supposing that they will not have a fair and impartial trial at Patna.

13. There remains, perhaps, on the face of these affidavits themselves, enough to indicate that there has been a long-continued and zealous activity on the part of the Police in procuring witnesses in support of the prosecution, such as may not possibly be without an effect upon the character of the evidence upon which the Sessions Court will have to act. But although for this reason more than common care will be required for the proper trial of the case, I do not see in it sufficient cause to justify our coming to the conclusion that the Sessions Court at Patna is not competent to exercise the requisite care.

14. Finally, it appears to me that it is not likely that points of law will arise in the course of this trial such as the Sessions Court cannot satisfactorily deal with; and in saying this I bear in mind that should the Sessions Court by any misfortune err in this matter, the error can be set right afterwards in this Court. On the whole, then, I think that the applicants have failed to show to this Court that it is necessary to promote the ends of justice that the removal asked for should be" ordered.

Macpherson, J.

15. The questions to be decided on this rule are, whether the High Court has power to order this case to be transferred to itself for trial; and whether, if this Court has the power, it ought to exercise it in this particular case.

16. I confess I think that there is great force in the argument of the Advocate-General, as to the power of transferring criminal cases to this Court from a Court in the mofussil: and it may be that if the matter were res integra, I should have adopted the view for which he contends. I am, however, unable to discover anything which actually excludes that interpretation of clause 29 of the Letters Patent, which gives this Court power to transfer cases to be tried by itself in the exercise of its original criminal jurisdiction. Indeed, I must admit that on a perfectly fair, reasonable, and unstrained reading of the words used, they do bear that interpretation.

17. This being so, I find that a Court consisting of three Judges (Peacock, C.J., and Norman and Markby, JJ.) have held expressly that the High Court has power to transfer a criminal case to itself. This was in the case of [The Queen Vs. Nabadwip Chandra Goswami and Kushadhwaj Mandal](#) , decided in April 1868; and the decision was given after formal argument of the question, though the judgment of one at least of the learned Judges turned more especially upon another point.

18. Under these circumstances, I am not prepared to say that I differ from my learned colleagues who now are clearly of opinion that clause 29 does confer this power on the Court. At the same time, I must add that I think that the language of clause 29 is ambiguous, and might fairly have been construed in the more restricted sense which the Advocate-General would put upon it, and which the position of clause 29 in the Letters Patent, and the provisions of certain other sections of the Letters, would seem to indicate that the framers of the Letters Patent intended should be put upon it.

19. I concur in the opinion that sufficient grounds have not been made out to justify the High Court in transferring this case for trial before itself in Calcutta.

20. The cases referred to as showing the circumstances under which a criminal case may in England be brought up by certiorari for trial in a superior Court, appear to me to have little or no applicability to the present matter. In England there is, I may say, practically no appeal in a criminal case from the decision of the Court which tries it,--no remedy for a miscarriage of justice. From the decision of the Patna Court, if it tries this case, there is

an appeal to the High Court on both facts and law. In my opinion, therefore, the mere possibility or probability that difficult questions whether of law or of fact will arise, is no reason for transferring a case under clause 29. For, in the event of a miscarriage on the part of the Mofussil Court, a sufficient remedy is provided in the right of appeal to this Court.

21. A very much stronger case must be made out to justify us in transferring a case to this Court, than would in England justify the removal of a case by certiorari. For the effect of a transfer under clause 29 is wholly different from the effect of a removal under a certiorari. In England, a case brought up on certiorari is tried in precisely the same manner before the superior Court as it would have been tried if it had not been removed. Here, a case transferred to this Court is tried under a procedure wholly different from that of the Mofussil Court from which it is transferred. While such a transfer in England involves change only of place of trial and Court, here it involves change of place of trial and Court, and also of procedure. I may add that the transfer of a criminal case to this Court may involve further very substantial changes in the personal status and privileges of the accused, and of all others who come from the mofussil into Calcutta for the purposes of the trial. To obtain the benefit of these changes is one of the avowed and principal objects of the present application.

22. Section 35 of the Criminal Procedure Code gives the High Court power to order the transfer of a criminal case from one Court in the mofussil to any other Mofussil Court of equal or superior jurisdiction, whenever it shall appear that such order will promote the ends of justice, or tend to the general convenience of the parties or witnesses." Considering the great difference which exists between the effect of a transfer from one Mofussil Court to another, and the transfer from a Mofussil Court to the High Court, it appears to me that it is u/s 35 of the Criminal Procedure Code, and under that section alone, that this Court ought to order transfers, except in very special cases. The excepted cases would comprise the class indicated by Sir Barnes Peacock in his judgment in [The Queen Vs. Nabadwip Chandra Goswami and Kushadhwaj Mandal](#) ,--i.e., cases _ in which the transfer is necessary in order to avoid the trial of what is substantially hut one issue, more than once, in different Courts with different jurisdictions. They would also include cases in which it is clearly made out that there is a substantial doubt as to whether the accused can have a fair trial elsewhere than in Calcutta. I see no reason, on the materials before me, for entertaining any such doubt. I therefore think the rule should be discharged.

Mookerjee, J.

23. I concur with Mr. Justice Phear in holding that the High Court has the power to direct the transfer of any criminal case to itself and to try the same. It cannot be denied that the Letters Patent give the High Court much larger powers and more extensive jurisdiction than those possessed by either the late Sudder Court or the Supreme Court. Clause 29 of the Letters Patent of 1865, I think, gives the power to the High Court to remove a criminal

case from any Court to any other Court, including itself. The Sudder Court was only a Court of Appeal, and it appears to me, therefore, that the Legislature in 1861 never contemplated that the Court should try and determine criminal cases as a Court of Original Criminal Jurisdiction. The language of section 35, Act XXV of 1861, is as follows:--

It shall be competent to the Sudder Court to order the transfer of any criminal case or appeal from a Criminal Court subordinate to its authority, to any other such Criminal Court of equal or superior jurisdiction, or to order that any offence shall be inquired into or determined in any District, or division of a District, other than that in which the offence shall have been committed.

The language used in clause 29 of the Letters Patent of 1865 is quite different. It does not use the words from a Criminal Court subordinate to the authority of the High Court," and also omits the word "such." On the contrary, the section says, "to any other Court of equal or superior jurisdiction." That the High Court is a Court of superior jurisdiction to that of a Sessions Judge, cannot, I apprehend, be denied. I cannot see how it can therefore be contended that the High Court, which can transfer criminal cases from the Court of one Sessions Judge to that of another (which is a Court of equal jurisdiction), is not empowered by the terms of clause 29 to remove the case to itself, which is undoubtedly a Court of superior jurisdiction to that of a mofussil Sessions Judge. I therefore entirely agree with the learned Judges who decided the case of [The Queen Vs. Nabadwip Chandra Goswami and Kushadhwaj Mandal](#) , and hold that it is competent to this Court to direct the trial by the High Court of an offence triable by the Sessions Court at Patna. This decides the first objection raised by the Advocate-General as to the jurisdiction of this Court under the Letters Patent to remove a mofussil criminal case to itself. With reference to the second objection raised by the learned Advocate-General as to the expediency of removing this particular case from the Court of the Sessions Judge of Patna to the High Court, I agree with my learned colleagues that no sufficient case has been made out by the prisoners to induce a reasonable belief that the prisoners will not have a fair and impartial trial in the Court of the Sessions Judge. English cases have been cited to show that where important questions of law arose, or where accounts of a complicated nature had to be tried, the Court of Queen's Bench issued writs of certiorari and removed the trial from the inferior Court to itself. But in England there is no appeal in criminal cases, whereas in this country a regular appeal on facts and law is allowed by our procedure, and any mistake of law or fact committed by the Sessions Judge can be rectified by an appeal to this Court. If a strong case had been made out that there is a reasonable apprehension that the prisoners will not have a fair trial at Patna, I would not have hesitated to direct the removal of this case from the Sessions Court at Patna to this Court for trial.

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"

² Only two judgments are reported,--viz., that of Peacock, C.J., and Markby, J. Norman, J., is reported as having concurred. Macpherson, J., stated that, understanding from Norman, J., that he had delivered a separate judgment, he had caused search to be made, when the following was found:

Norman, J.--On the first question discussed, I entirely concur with the Chief Justice. I am glad that the decision has been based on no technical point, but on the broad ground laid down by him.

Every technical objection which the law allows the prisoner has been made in his favor, and it appears to me that these objections are entirely unfounded. I desire to guard myself against being supposed to allow that the prisoner does not get the full benefit of every exception. I agree with the first proposition of Mr. Newmarch, that in order to a valid conviction under Act XIII of 1865, there must be a valid charge,--that is, a charge by a Justice of the Peace, or a Magistrate having jurisdiction to prefer that charge. I also go with another proposition of Mr. Newmarch's, that in this particular case, supposing that Mr. Ryland acted as a Magistrate, and not as a Justice of the Peace, it was essential that he should have been empowered by the High Court, u/s 29 of the Letters Patent, in order to give him, a Mofussil Magistrate, power to hold the preliminary investigation at Serampore of a charge against the prisoner, who had been arrested in Calcutta for a crime alleged to have been committed in Calcutta.

I am not prepared to say that the rule laid down in *Knowlden v. The Queen* 33 L.J., M.C., 219 is sufficient to decide the case now before us. The marginal note of that case is as follows:--"By the 22 & 23 Vict., cl. 17, s. 1, no bill of indictment for certain specified offences shall be presented or found by the grand jury, unless some one of certain conditions have been performed. Held, that it was not necessary that the performance of any of these conditions should be averred on the face of the indictment, or proved before the petty jury." On the argument, the cases of *Hollis v. Marshall* 2 H. & N., 735 and *The King v. Fraser* 1 Moo. Cr. C., 407 were cited for the defendant. Mr. Justice Blackburn pointed out that the grand jury had a general jurisdiction [though the statute had imposed certain restrictions on the general jurisdiction which they already had] to find the bill. And it is that fact which distinguishes *Knowlden v. The Queen* 33 L.J., M.C., 219 from those above mentioned. In that case the indictment was presented by an authority,--viz., the grand jury,--which had general jurisdiction. In the present case, if the facts are as supposed by Mr. Newmarch, the charge was preferred by an officer not having jurisdiction, unless specially empowered by the order of the High Court, under the 29th

section of the Charter, and therefore it would have been necessary, if the matter were put in issue, to show that the Magistrate had such special powers, because without such evidence, it would appear that the charge was preferred by an officer not having jurisdiction.

Apart from Act XIII of 1865, if the prisoner desired to take the objection that the Magistrate had not been so empowered, I think he could not have done so on his trial, under the plea of not guilty. The objection does not show that no offence had been committed of which this Court had jurisdiction, and therefore the case is not like that of *The Kinloch's Foster's Cr. C.*, 17-23. The offence was committed, and the prisoner arrested within the jurisdiction of this Court, and to such a case, the observation of Lord Ellenborough, in *The King v. Johnson* 6 East, 601, applies,--viz., the presumption is, that nothing shall be intended to be out of the jurisdiction of a superior Court of general jurisdiction, which is not alleged, and shown to be so." *The King v. Johnson* 6 East, 601 shows that a plea to the jurisdiction would have been bad, because it would not, and could not have shown any other tribunal before which the prisoner ought properly to have been tried.

It is said that the Crown was bound to prove, or was at least liable to be called on to prove, that an order had been made directing the transfer of the case for the preliminary investigation. The 3rd section of Act XIII, 1865, provides, that "any Justice of the Peace or Magistrate who shall commit to custody or hold to bail any person for trial before the High Court, for an offence committed within the local limits of its ordinary original civil jurisdiction, shall, together with all examinations, &c., deliver to the Clerk of the Crown a written instrument of charge, signed by him, stating for what offence such person is committed for trial." The 4th section empowers the Clerk of the Crown to consider, and, if necessary, to amend the charge, and directs that the charge, with any such amendment, is to be recorded. The 6th section enacts, that" upon charges so recorded as aforesaid, persons committed to custody or held to bail, shall be deemed to have been brought before the High Court in due course of law, shall be arraigned at suit of the Crown, and the verdict recorded thereon." The effect of this 6th section is that, if a person is committed for trial before the High Court for an offence committed, or which was by law so dealt with as if it had been committed, within the local limits by any Magistrate, the charge is to be deemed to have been brought before the High Court in due course of law. It follows, that if, in a particular case, any special order of the High Court is necessary to empower the Magistrate to bold the investigation, it must be presumed for the purposes of the trial that such preliminary order was duly made. The duty of the Court in dealing with a charge so recorded is clearly prescribed in the 6th section. The prisoner is to be arraigned, and the verdict recorded upon the charge. It does not follow that the prisoner has no remedy, if there were no such order. No doubt, if a charge by a Magistrate, not having any jurisdiction, is sent up, the prisoner can question it; but that apparently must be by motion to quash the charge, before the trial, or by error in fact, after the verdict. I think the Crown was not bound to give evidence of the order, and that the learned Judge

was not bound to receive the evidence. The prisoner was arraigned, and the verdict given as directed by the 6th section, and the learned Judge was right in accepting and recording the verdict as the case stood.

As to arrest of judgment, I think that there was not any ground for moving in arrest of judgment, because the matter alleged to be error does not appear, on the face of the record. No injury has been sustained by the prisoner. We are not bound to go into facts, because, as the 6th section raises prima facie presumption of the regularity of the charge, it was for the prisoner to rebut it, and show that the charge was not rightly instituted, and he has not done so. But if we do go into the facts, there is sufficient proof by evidence under the hand of the Registrar, an officer of the Court, that an order was made directing that the preliminary enquiry should take place before the Magistrate of Serampore.

It has been urged that clause 29 of the Letters Patent does not give to the High Court power to give such a direction as to the preliminary investigation, The first branch of that clause refers to the transfer of criminal cases and appeals; the second branch empowers the Court to give directions as to holding preliminary investigation. (Sis Lordship read the clause in question), I know of no conceivable reason why the words "any officer or Court" should have the restricted sense contended for by Mr. Newmarch. His contention even as to the first branch, it seems to me, entirely failed, The result is that, in my judgment, whether Mr. Ryland was a Justice of the Peace or not, there is no reason for alleging that he was not an officer competent to prefer the charge, and on that ground, I think the conviction wholly unassailable.

Upon the point, whether we can take judicial notice that Mr. Ryland is a Justice of the Peace for Bengal, Behar, and Orissa, our records show that he is so. He is an officer of the Court, subject to it, and constantly committing prisoners for trial to the Court. Before we receive such charges are we to enquire and take evidence whether he has received a commission or not? His commission is now in Court, under the Seal of the Court, and the signature of the Chief Justice.

It seems to me plain, that we cannot but recognize our own records and acts, and our own Subordinate Magistrates. Mr. Ryland professed to act as a Magistrate. I think in so doing he acted rightly, and I do not rest my judgment on the ground that he was also a Justice of the Peace for Bengal, Behar, and Orissa.

3

Motion No. 52 of 1871

22.04.1871

The Queen Vs. Ameer Khan and Ors.

Norman, Officiating C.J. and Loch, JJ.

Baboo Armada 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.

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 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.

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29.04.1871

The Queen Vs. Ameer Khan and Ors.

Norman, Offg. C.J., Macpherson and Mookerjee, JJ.

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 of the late Supreme Court, and some in excess of those of the late Sudder Court, for controlling the administration of justice in the country generally, were given to the High Court, as being a Court combining the elements which formed the late Sudder and Supreme Courts; and the contention of the Government is that it was never intended to authorize the assumption of a single Judge sitting in the Original Jurisdiction to exercise those powers uncontrolled by, or it may be contrary to, the opinions of the Court at large. It should be submitted that as a matter of fact the Judges who sit on the Original Jurisdiction, in practice, belong to one only of the elements of which the combined Court is composed, and that the exercise of the power assumed by Mr. Justice Phear is contrary to the whole spirit and intention of the Acta and Charters by which the Court is constituted.

" On these grounds the Government trust that the Court will take the question into consideration, both with reference to the matter pending before Mr. Justice Phear, and in order to guide the Judge of Patna, before whom the case is appointed to come on immediately, and in whose Court a host of witnesses are cited to appear, and pass such orders as may appear to be proper under the circumstances of the case."

Baboos Annada Prasad Banerjee and Jagadanand Mookerjee appeared in support of the petition.

Norman, J.

I am of opinion that the Court cannot interfere with Mr. Justice Phear's decision in the case of Ameer Khan, unless that decision can be called in question in a formal and regular way. We have been asked to interpose our authority, which it is suggested that this Court possesses u/s 15 of the 24 & 25 Victoria, c. 104; but Mr. Justice Phear, as a Judge of the High Court, making an order in the original criminal jurisdiction of that Court, is not a Court subject to our control u/s 15.

Macpherson, J.

I am of the same opinion.

Mookerjee, J.

I am of the same opinion.