CRIMINAL JURISDICTION.

SPECIAL TRIBUNAL UNDER ACT XIV OF 1908.

Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Chandavarkar and Mr. Justice Heaton.

EMPEROR *v.* VINAYAK DAMODAR SAVARKAR AND OTHERS.* 1910. *October* 6.

Effect of illegal arrest on trial of accused—Criminal Procedure Code (Act V of 1898), section 188(1)—Extradition.

Where a man is in the country and is charged before a Magistrate with an offence under the Penal Code, it will not avail him to say that he was brought there illegally from a foreign country.

The principle upon which English cases to this effect are based underlies also section 188 of the Criminal Procedure Code (Act V of 1898).

ONE Vinayak Damodar Savarkar and 37 other accused, charged with conspiracy under sections 121, 121A, 122 and 123 of the Indian Penal Code, were committed for trial before a Special Bench constituted under the Criminal Law Amendment Act (XIV of 1908). Savarkar, who had been arrested in England and brought out to India under the Fugitive Offenders Act, 1881, stated that he had escaped from police custody at Marseilles and had been recaptured. Relying on the fact of his having set foot in France, he now claimed the asylum of that country, and, contending that the Court has no jurisdiction over him, took no further part in the trial.

The Court declined to discuss matters connected with international law and the trial proceeded against all the accused jointly.

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*Special Bench cases Nos. 2, 3 and 4 of 1910.

(1) Section 188 of the Criminal Procedure Code (Act V of 1898) runs as follows:—When a Native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India, or when any British subject commits an offence in the territories of any Native Prince or Chief in India . . . . . he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found: Provided that no charge as to any such offence shall be inquired into in British India unless the Political Agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in British India, and, where there is no Political Agent, the sanction of the Local Government shall be required . . . . . .

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In the course of the hearing, however, questions were put in the cross-examination of a police witness with the object of showing that the rearrest of Savarkar at Marseilles was illegal and that the Court had no jurisdiction over him and that, therefore, the other accused could not be tried jointly with him. The point as to the relevance of the illegality (if any) of the rearrest was therefore argued, and for the purposes of the argument it was assumed that the rearrest had, in fact, been illegal.

Jardine, Acting Advocate-General, with *Weldon*, *Velinkar* and *Nicholson* for the Crown.

The accused has been "found" in British India within the meaning of section 188 of the Criminal Procedure Code.

In *Empress* v. *Maganlal*[1] the same word, in the Foreign Jurisdiction and Extradition Act (XXI of 1879), was held to mean "actually present". That case followed *The Queen* v. *Lopez*[2]. In *Muhammad Yusuf-ud-din* v. *Queen-Empress*[3] the Privy Council expressly precluded themselves from laying down any law as to what would be the consequences of the arrest therein. There was no desire to press the case, and the only question they had to decide was as to the illegality of the arrest, not as to the illegality of the proceedings consequent on the arrest. That case was considered in *Sobha and Baggu* v. *Queen-Empress*[4]. See also "Cockburn, C. J.'s charge to the Grand Jury in the case of *Queen* v. *Nelson and Brand*." Again in *Emperor* v. *Ravalu Kesigadu*[5] it was held that the question whether the officer who effected the arrest was acting within or beyond his powers did not affect the question of whether the accused was guilty or not of the offence charged.

Baptista for certain of the accused.

Section 188 does not apply, although sanction was given under it. It only applies to cases where the offence has been committed outside British India. See *Queen-Empress* v. *Ganpatrao Ram-*

(1) (1882) 6 Bom. 622.
(2) (1858) 27 L. J. M. C. 48.
(3) (1897) L. R. 24 I. A. 137.
(4) (1899) P. R. No. 6 of 1899 Cr.
(5) (1902) 26 Mad. 124.

chandra[1]. Again the word "found" may be taken to mean "actually present," but not "illegally arrested and brought by force." *Empress* v. *Maganlal*[2] was entirely based on English decisions: they do not apply here. On the other hand the Privy Council in *Yusuf-ud-din's* case[3] held the arrest illegal and quashed the proceedings on that ground. *Dixon* v. *Wells*[4] implies that the important question is whether the accused has protested against the jurisdiction at the outset.

Counsel further pressed arguments based on a contention that the enquiry had been entered upon before sanction given under section 188.

SCOTT, C. J.:—The accused Vinayak Damodar Savarkar was committed to this Court by Mr. Montgomerie, First Class Magistrate of Nasik, for trial upon charges framed under sections 121, 122 and 123 of the Penal Code. At the commencement of the trial here the accused said that he would take no part in the trial but asked for an adjournment and for facilities to make to the British and to the French Governments representations regarding what he contended was his illegal arrest in Marseilles after he had escaped from the custody of police officers charged with the duty of bringing him from England to Bombay. His application was refused on the ground that it was beyond the province of this Court to do anything more than try him for the offences in respect of which he had been committed for trial. The trial then proceeded against him and other accused jointly charged with him. After certain witnesses had been examined Mr. Baptista appearing for certain of the accused wished to put questions to one of the police witnesses regarding the escape and rearrest of Vinayak at Marseilles with a view to show that the rearrest was illegal and with the intention of contending thereon that the trial of Vinayak was without jurisdiction and that, if so, the trial could not proceed against the prisoners charged jointly with him.

The Court upon this heard arguments as to what would be the effect on the trial of proof that the arrest was illegal.

(1) (1894) 19 Bom. 105.
(2) (1882) 6 Bom. 622.
(3) (1897) L. R. 24 I. A. 137.
(4) (1890) 25 Q. B. D. 249.

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The learned Advocate-General without admitting any of the allegations made regarding the rearrest at Marseilles contended that the circumstances of Vinayak's rearrest were irrelevant.

This contention is, in our opinion, correct. It appears that Mr. Montgomerie, a First Class Magistrate at Nasik, upon a complaint duly authorised under section 196 of the Criminal Procedure Code and sanctioned so far as it concerned offences committed out of India under section 188, issued a warrant directing that Vinayak should be brought to Nasik from Bombay where he was expected to land on or about the 22nd of July 1910 to be dealt with according to law. Vinayak arrived in Bombay as expected having been sent out to India under the Fugitive Offenders Act by a Magistrate in London, and was taken to Nasik under Mr. Montgomerie's warrant. The charges against him were there investigated by Mr. Montgomerie under the procedure prescribed by the Criminal Law Amendment Act, 1908, and he was then committed for trial to this Court as already stated. For the purpose of argument we will assume that Vinayak escaped from custody at Marseilles and was rearrested there by the British Police under circumstances not authorised by the warrant which they held or by section 66 of the Criminal Procedure Code or section 28 of the Fugitive Offenders Act.

The argument based by Mr. Baptista on these assumptions is one which has often been advanced before, but so far as we are aware always without success.

Where a man is in the country and is charged before a Magistrate with an offence under the Penal Code it will not avail him to say that he was brought there illegally from a foreign country. This appears very clearly from Lord Chief Justice Cockburn's charge to the Grand Jury in *The Queen* v. *Nelson and Brand*[1]. It was held that George William Gordon had been by an illegal and unwarrantable act arrested and conveyed by the Governor and Custos of Kingston in Jamaica to Morant Bay in that island, and there placed before a Military Court Martial administering Martial law in Morant Bay, but not in Kingston. The Lord Chief Justice however held that having

(1) Charge to the Grand Jury, Second Edition, in the case of *Queen* v. *Nelson and Brand*, p. 118.

been brought within the ambit of Martial law he was liable to be tried under it. He said (at pp. 118 and 119), "When Mr. Gordon was brought within the ambit or sphere of the jurisdiction of Martial law—assuming always, on this part of the case, that there was such a jurisdiction—it seems to me that it was not for the parties administering the Martial law to inquire how he had been brought there. I will illustrate the matter by a case which has happened before now. Suppose a man to commit a crime in this country, say murder, and that before he can be apprehended he escapes into some country with which we have not an Extradition Treaty, so that we could not get him delivered up to us by the authorities, and suppose that an English police officer were to pursue the malefactor, and finding him in some place where he could lay hands upon him, and from which he could easily reach the sea, got him on board a ship and brought him to England, and the man were to be taken in the first instance before a Magistrate, the Magistrate could not refuse to commit him. If he were brought here for trial, it would not be a plea to the jurisdiction of the Court that he had escaped from justice, and that by some illegal means he had been brought back. It would be said 'Nay, you are here; you are charged with having committed a crime, and you must stand your trial. We leave you to settle with the party who may have done an illegal act in bringing you into this position; settle that with him.' So here, although if Mr. Gordon had not been put to death, but had been subjected to some minor punishment, some of those scourgings or other things that we have heard of in Jamaica—if he had come to England and had brought an action for damages against Governor Eyre, it may well be that a jury of Englishmen, presided over by an English Judge, would have awarded him exemplary damages for the wrong that had been done him; but that does not affect the question we are now considering, namely, whether, having been brought within the ambit of the Martial law, he was liable to be tried under it. I cannot but think that he was."

The report of *In re Parisot*[1] affords two instances in which the same view was taken by the Court upon protests being made

(1) (1889) 5 T. L. R. 344.

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by prisoners as to the illegality of their arrests outside the British Island. In one case the arrest was in Brussels; in the other in Jersey.

In *Ex parte Scott*[1] the alleged illegality of an arrest in Brussels was held to be irrelevant.

The principle upon which these cases are based underlies also section 188 of the Criminal Procedure Code which, in that Vinayak, a Native Indian subject, is charged *inter alia* in respect of certain offences committed in London, applies to this case. Under that section it has been held in *Empress* v. *Maganlal*[2] that a Native Indian subject arrested without a warrant by British Indian Police in a Native State and brought to Ahmedabad was 'found' in Ahmedabad so as to give jurisdiction to the Magistrate at that place. This decision followed that of 14 Judges sitting in the case of *The Queen* v. *Lopez*[3] where it was held that a man is 'found' for the purposes of criminal jurisdiction under 18 and 19 Vict., c. 91, s. 21, wherever he is actually present whether or not he has been brought to that place against his will.

Mr. Baptista has however relied upon the judgment of the Judicial Committee in *Muhammad Yusuf-ud-din* v. *Queen-Empress*[4] as being inconsistent with the case relied upon by the prosecution since the Judicial Committee held that an arrest of a Hyderabad subject at a station on a railway line in the Hyderabad State over which the Queen-Empress had no general criminal jurisdiction was illegal and advised Her Majesty that the warrant and arrest and the proceedings thereon should be set aside.

It is to be observed however that the Lord Chancellor in delivering judgment was careful to point out that their Lordships were called upon to pronounce their opinion as to the legality of the arrest, but they had nothing to do with the question whether or not if the accused had been found within British Territory he could have been lawfully tried and convicted; nor with the consequences of the arrest being lawful or otherwise. The judgment does not purport to deal with the question whether an illegal arrest in foreign territory vitiates an inquiry by a Magistrate

(1) (1829) 9 B. & C. 446.
(2) (1882) 6 Bom. 622.
(3) (1858) 27 L. J. M. C. 48.
(4) (1897) L. R. 24 I. A. 137.

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into an offence against Indian Penal Code charged against the person arrested when brought before the Court; nor does it appear from the report that the question was argued. That has therefore no bearing upon the question now under consideration.

For the above reasons we hold that both under section 188 of the Criminal Procedure Code as regards offences committed in London and apart from that section as regards offences committed in British India neither the jurisdiction of the Magistrate to inquire into the case, nor the jurisdiction of this Court to try it, can be affected by any illegality in connection with the rearrest of Vinayak which may have occurred at Marseilles.

K. McI. K.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Rao.

SOMANA BASAPPA (ORIGINAL PLAINTIFF), APPELLANT, *v.* GADIGEYA KORNAYA (ORIGINAL DEFENDANT), RESPONDENT.*

1910. *November* 15.

Evidence Act (I of 1872), section 92, proviso I—Dekkhan Agriculturists' Relief Act (XVII of 1879), section 10A(1)—Redemption suit—Sale in reality a mortgage—Evidence of oral agreement varying the written document.

The plaintiff brought a redemption suit under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) alleging that the deed which he had

* First Appeal No. 215 of 1909.

(1) Section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879)—

10A. Whenever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party that any transaction in issue entered into by such agriculturist or the person, if any, through whom he claims was a transaction of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under this chapter, the Court shall, notwithstanding anything contained in section 92 of the Indian Evidence Act, 1872, or in any other law for the time being in force, have power to inquire into and determine the real nature of such transaction and decide such suit or proceeding in accordance with such determination and shall be at liberty, notwithstanding anything contained in any law as aforesaid, to admit evidence of any oral agreement or statement with a view to such determination and decision:

Provided that such agriculturist or the person, if any, through whom he claims was an agriculturist at the time of such transaction:

Provided further that nothing in this section shall be deemed to apply to any suit to which a *bonâ fide* transferee for value without notice of the real nature of such transaction or his representative is a party where such transferee or representative holds under a registered deed executed more than twelve years before the institution of such suit.