

of a municipal rule. The Court refers the District Magistrate to the court's ruling, of 17th November last, in the case of *Reg. v. Lakhá Jibháí* in the printed Statement of Criminal Rulings on the Code of Criminal Procedure from 1st July to 31st December 1869.

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*Papers returned.*

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April 4.

*In re Rávji bin Keshav.*

*Extradition—Gáikvád's Treaty—Accused person—Preliminary Inquiry—Warrant—Act VII. of 1854, Sec. 23—Act XVII. of 1862, Schedule.*

Sec. 23 of Act VII. of 1854 is not repealed by the Schedule to Act XVII. of 1862.

The treaty of the 6th of November 1817 between H. H. the Gáikvád of Barodá and the East India Company provides for the delivery upon requisition of accused persons to H. H. the Gáikvád *in a manner other than* in accordance with the provisions of the sections of Act VII. of 1854 prior to the 23rd section. The latter section is, therefore, applicable in such a case.

*Seemle* that Government would not be justified in delivering up an accused person to H. H. the Gaikvád without holding a preliminary inquiry into the guilt of such accused.

Where a warrant issued under Sec. 23 of Act VII. of 1854 directed the accused person to be delivered up to the Resident at Barodá, without showing either that an inquiry had been made, or was about to be made, the Court held that it was not, therefore, invalid, as the presumption was that the accused was to be delivered up to the Resident in order that that officer might institute such an inquiry as is required by the Act.

A warrant issued under Sec. 23 of the Act should recite either that an inquiry has been held, or is about to be held, with reference to the guilt of the accused.

ON the 3rd of April 1871, before GREEN, J., *Macpherson* moved for and obtained a writ of *habeas corpus* directed to F. H. Souter, Esquire, Commissioner of Police for the City and Island of Bombay, and to all other police officers of the said city and island, to bring up the body of Rávji bin Keshav on the 4th of April, together with the day and cause of his being taken, &c.

The writ was granted upon reading the affidavit of Rústamji Mehervánji Nárelváli, which was as follows:—

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"One Rávji bin Keshav was this morning, as I am informed and believe, sent for by Mr. Souter, the Commissioner of Police, and was by him arrested, under a warrant signed by Mr. W. Wedderburn, the Political Secretary of the Government of Bombay, on a charge of criminal breach of trust.

"Such warrant purported to be executed under the provisions of Sec. 23 of Act VII. of 1854.

"I am informed and believe that the said arrest ought to have been made, and the practice followed which is pointed out, by Sec. 7 of the said Act, and that the said Rávji bin Keshav ought to have been brought before a Magistrate or Justice of the Peace for inquiries to be made.

"I am informed by the said Mr. Souter that he has received no instructions to adopt the course so laid down in Sec. 7, and, on the contrary, is directed by the said warrant at once to send the said Rávji bin Keshav to be delivered to the Political Resident at Barodá, and I am further informed and believe that the said Rávji bin Keshav will be sent in custody to Barodá, by this evening's train, without any inquiry having been made as to the validity of the charge against him.

"I, therefore, pray that a writ of *habeas corpus* may be issued by this Honorable Court, and a rule *nisi* to show cause why an inquiry should not be made, and the usual steps taken, as directed by Sec. 7 of the said Act."

On the 4th of April, Rávji bin Keshav was produced in court by Mr. Souter, together with the warrant under which Rávji bin Keshav had been arrested. The warrant (which was accompanied by a letter from Mr. Wedderburn, Acting Secretary to Government, forwarding the warrant, and requesting that Rávji might not be subjected to more restraint than should appear necessary to ensure his safe custody) ran thus:—

"WARRANT.

"To the Commissioner of Police, Bombay.

"Whereas requisition has been made to His Excellency the Governor of Bombay in Council by His Highness the Gáikvád for the surrender of Rávji bin Keshav, charged with having committed criminal breach of trust in the territory of Barodá, you are hereby required, under the provisions of Sec. 23 of Act VII. of 1854, to cause the said Rávji bin Keshav to be conveyed in custody out of the British territories for the purpose of delivering him to the Resident at Barodá.

"W. WEDDERBURN,

"Secretary to Government.

"Bombay Castle, 1st April 1871."

The Acting Advocate General (*the Honorable A. R. Scoble*) showed cause:—The prisoner is in custody under a legal warrant issued in conformity with the provisions of Act VII.

of 1854, Sec. 23. That section authorises the Government to deliver up any person liable to be proceeded against by any foreign State, in accordance with the stipulations contained in any treaty that may exist between the Government and such foreign State, upon requisition made by such foreign State. The existing treaty between the Gáikvád and the British Government (dated 6th November 1817) will be found at page 330 of the 6th volume of Mr. Aitchison's Collection of Treaties. The 9th article contains the following provision: "It is, therefore, hereby agreed that offenders taking refuge in the jurisdiction of either party shall be surrendered on demand without delay or hesitation." That is an extradition treaty of the widest possible nature, and to carry it into effect the Government have issued the present warrant. All the requirements of the Act have been complied with. (I.) Requisition has been made by the Gáikvád. (II.) There is a treaty between him and the British Government. (III.) There is a warrant signed by Mr. Wedderburn, Secretary to Government, which is the proceeding for carrying into effect the treaty which the Government has "thought fit to adopt." Sec. 23 of Act VII. of 1854 is untouched by Act XVII. of 1852, which repeals Act VII. of 1854 only so far as it relates to warrants not issued under its provisions.

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*McCulloch*, in support of the rule:—(I.) This is not a case falling within the purview of Sec. 23. That section only relates to cases not expressly provided for by Act VII. of 1854, or, in other words, to offences which are not heinous: the offence here charged is a heinous offence. It comes within the meaning of "embezzlement" mentioned in Sec. 21. Sec. 22 still further enlarges the meaning of the word "heinous," rendering it applicable to all offences which the Government may consider serious. If this is a heinous offence, the earlier provisions of the Act must be complied with. There must be a preliminary inquiry before a Magistrate. [GREEN, J., referred to the provisions of the treaty which provide for the delivery up of the offender *without delay or hesitation*.] That is not inconsistent with my

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argument. If a Government adopts the safeguards which the law provides for the protection of accused persons, it does not thereby lay itself open to the charge of either delay or hesitation. (II.) Even assuming that this case falls within the terms of Sec. 23, and the remaining clauses of the Act have no application to it, either by reason of this not being a heinous offence, or of its being provided for by treaty "in a manner other than that provided by the Act," still I contend that the warrant is invalid, because there has been no preliminary inquiry into the charge contained in the requisition, as provided for in Sec. 23 of the Act. That section says that "it shall be lawful for the Government to adopt such proceedings for carrying the treaty into effect, and for the surrender of such person, *and* for making any preliminary inquiry into the charge contained in the requisition as it shall think fit. The section must be construed strictly *in favorem libertatis*, and, so being construed, a preliminary inquiry would seem to be a condition precedent to the delivery up of a person alleged to be an offender. A section like this is liable to be abused for political purposes, and the court will be careful not to abridge the safeguards introduced for the protection of accused persons. (III.) I contend that Sec. 23 is repealed by the schedule to Act XVII. of 1862.

GREEN, J. :—The prisoner, Rávji bin Keshav, is produced by the Commissioner of Police, in obedience to the writ of *habeas corpus* issued yesterday, and with the prisoner he produces a warrant or order signed by Mr. Wedderburn, one of the Secretaries to the Government of Bombay, under date the 1st of April 1871. This warrant or order, after stating that requisition had been made to the Government of Bombay for the surrender of Rávji bin Keshav, charged with having committed criminal breach of trust in the territory of Barodá, requires the Commissioner of Police, under Sec. 23 of Act VII. of 1854, to cause the said Rávji bin Keshav to be conveyed in custody out of the British territory for the purpose of delivering him to the Resident at Barodá. The section (23) referred to in the order or warrant is as follows:—"If by any treaty Her Majesty or the East India Company shall be

bound to deliver up to any foreign Prince or State any person liable to be proceeded against by the laws of such foreign Prince or State in any case not expressly provided for by this Act, or in any manner other than that provided by this Act, it shall be lawful for the Government of any part of the territories under the Government of the East India Company in which such person may be found, upon requisition made by or on the part of such foreign Prince or State, to adopt such proceedings for carrying such treaty into effect, and for the surrender of such person, and for making any preliminary inquiry into the charge contained in the requisition as it shall think fit; and any such order of the Government in writing, under the hand of one of the Secretaries of such Government, shall be a sufficient authority and justification for all acts to be done in execution thereof." Now there is a treaty in force between the British Government and the State of the Gáikvád, made on the 6th of November 1817. By the 9th article of this treaty it is provided that "offenders taking refuge in the jurisdiction of either party" (*i. e.*, the East India Company or His Highness the Gáikvád) "shall be surrendered on demand without delay or hesitation."

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It was argued on behalf of the prisoner that Sec. 23 of Act VII. of 1854 had been repealed by the schedule to Act XVII. of 1862. By the latter Act and its schedule "so much of" (Act VII. of 1854) "as relates to warrants issued otherwise than under the provisions of the said Act" is repealed. But I am of opinion that the just-quoted words must be taken to refer to part of Sec. 5 of Act VII. of 1854, and not to Sec. 23, as the only part of the Act which can be said "to relate to warrants issued otherwise than under the provisions of the Act" is to be found in Sec. 5. However this may be, I cannot construe Act XVII. of 1862 as repealing Sec. 23 of Act VII. of 1854. The word "warrant" is not specifically mentioned in that section at all, and if the word "order," such as is provided for in the section, be taken to include a "warrant," then the section provides for the issuing of such order or warrant, and relates to a warrant or order issued under one of the provisions of the Act, and so does not come within the repealing words of the schedule in question.

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Then it was argued that Sec. 23 does not apply to this case, as the offence charged is criminal breach of trust, which, by the conjoint effect of Secs. 21 and 22 of the Act and of the treaty, is a "heinous offence," and, that being so, the proper course was to cause a preliminary inquiry to be held in the manner provided by the earlier sections of the Act, and to follow the course of procedure there pointed out. I do not think it necessary to decide this point, as Sec. 23 applies not only "in cases not expressly provided for by the Act," but also where Her Majesty by any treaty is bound to deliver up any person "in any manner other than that provided by the Act." Now the manner of delivery provided by the treaty which has been referred to is, in my opinion, certainly "other" than the manner which is provided by the Act in the sections preceding Sec. 23, and for that reason I am of opinion that the present is a case to which Sec. 23 is applicable.

It was further argued that, assuming Sec. 23 to apply to the case, it does not make it lawful for Government to deliver up an accused person without preliminary inquiry, as the section clearly contemplates such preliminary inquiry being held. Looking at the wide language of the section in question, I do not feel myself warranted in laying down the rule that such preliminary inquiry as is provided for by the earlier sections of the Act is made imperative, though I think the section does certainly contemplate the holding of some sort of preliminary inquiry, and I should be disposed to consider it an oppressive, and perhaps an illegal, exercise of the power given by Sec. 23 if an accused person were to be delivered up without any preliminary inquiry at all. Had the order or warrant now in question directed the surrender of the prisoner to the officers of the Gáikvád without showing that any preliminary inquiry had been held, I should, I think, have been disposed to order his discharge. But the order or warrant purports to be under the provisions of Sec. 23, and to direct the delivery of the prisoner to an officer of the British Government, namely, the Resident at Barodá, and not to any officer of the Gáikvád's government. The Resi-

dent at Barodá is a Justice of the Peace, besides being an officer of considerable trust and responsibility ; and, having regard to the fact that the order or warrant professes to be under Sec. 23, I ought, I think, to consider that this is a proceeding which the Government, in the exercise of the discretionary power given by Sec. 23, has thought fit to adopt "for carrying the treaty into effect, and for the surrender of the prisoner in question, and for making any preliminary inquiry into the charges contained in the requisition." The crime charged having been committed at Barodá, the facilities for making such preliminary inquiry as is contemplated by the Act must be greater than they would be in Bombay.

I should add that, in my opinion, it would be desirable in form, when an order is made under Sec. 23, that any warrant or order for conveying any prisoner out of the British territory, except where a preliminary inquiry had been held there, should state the order (if any) for holding such preliminary inquiry at the place to which the prisoner is to be conveyed, and that the warrant or order is made for the purpose of conveying the prisoner to the place where such preliminary inquiry is to be held. The order for the surrender to the foreign power would, of course, be a separate one. For the above reasons, I remand the prisoner, Rávji bin Keshav, to custody.

Attorneys for the accused : *Leathes & Crawford.*

Attorney for F. H. Souter : *R. V. Hearn*, Government Solicitor.



REG. v. VENKA'JI BHA'SKAR.

April 13.

Mahálkari—Act XI. of 1843, Sec. 8—*Disobedience of Order issued by Mahálkari—Ind. Pen. Code, Sec. 174.*

A Mahálkari invested with the powers of a 2nd Class Subordinate Magistrate cannot issue a summons under Sec. 8 of Act XI. of 1843, nor can a person be convicted under Sec. 174 of the Indian Penal Code for having disobeyed such a summons so issued.

**I**N this case the accused, Venkáji Bháskar, was convicted by the Second Class Subordinate Magistrate of Dambal,

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