

ORIGINAL CRIMINAL.

Before Mr. Justice Batty.

EMPEROR v. ROBERT COMLEY AND OTHERS.*

1904.

November 28.

Aden Courts Act (II of 1864), sections 17, 20, 22, 23†—Criminal Procedure Code (Act V of 1898), sections 447, 449—Resident's Court at Aden—Sessions Court—Transfer of case to the High Court—Jurisdiction of the High Court to transfer a case to itself from the Court of the Resident at Aden—Letters Patent, clause 29.‡

It is not competent to the Resident at Aden, to whose Court as a Court of Session a case is committed under section 447 of the Criminal Procedure Code, 1898, to transfer the case to the High Court, under the provisions of section 449 of the Code, on the ground that the offence cannot be adequately punished by him.

The powers of the Court of Session conferred upon the Resident at Aden by the Aden Courts Act (II of 1864) are not merely such as are defined in the Criminal Procedure Code, 1898; but such as are provided expressly in the Act.

* Crown Side No. 1, 5th Sessions, 1904, High Court of Bombay.

† The Aden Court's Act (II of 1864), sections 17, 20, 22 and 23 run as follows:—

17. The administration of criminal justice at Aden is hereby declared to be vested in the Court of the Resident, save as is herein otherwise provided.

20. The Resident shall, except as in this Act is otherwise provided, exercise all the powers of a Court of Session as defined in the Code of Criminal Procedure, 1882, and he may also, when it shall seem to him proper so to do, exercise the powers of a Magistrate as defined in the said Code, except in cases triable before himself as a Court of Session.

22. If any European British subject shall be charged in Aden with any offence (other than an offence punishable with death under the Indian Penal Code), which a Justice of the Peace shall not be competent to punish, and there shall be sufficient grounds for committing him for trial, such European British subject shall be committed to the Court of the Resident, and shall be tried by the Resident.

23. Save as in this Act otherwise provided, the proceedings in all Criminal cases of any description brought in any Court in Aden shall be regulated by the Code of Criminal Procedure, 1882.

‡ Amended Letters Patent, clause 29 is as under:—

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.

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itself. And section 449 of the Code of Criminal Procedure, 1898, cannot affect those provisions.

The High Court of Bombay can, under clause 29 of the Amended Letters Patent, transfer to itself a case pending in the Court of Session at Aden.

THE accused, thirteen in number, were charged under section 325 of the Indian Penal Code (Act XLV of 1860) with voluntarily causing grievous hurt to one Alulabint Jamoh, committed at Steamer Point in the District of Aden.

They were placed for trial before the District Magistrate of Aden (Lieutenant-Colonel J. Davies), who, after taking all the evidence in the case, committed the accused, under section 447 of the Criminal Procedure Code, 1898, for trial by the Court of Sessions at Aden.

Before the Court of Sessions at Aden (Major-General H. M. Masons, Resident at Aden), the accused pleaded not guilty and claimed to be tried. But the Sessions Judge on a perusal of the proceedings before the Committing Magistrate came to the conclusion that the offence charged could not be adequately punished by him: and he, therefore, transferred the case to the High Court of Bombay under section 449 of the Criminal Procedure Code, 1898. The order run:—

“At this stage, I must record that having carefully gone through the proceedings of this case before the Committing Magistrate, I am of opinion that the offence of which the accused are charged and which appears to be proved, cannot be adequately punished by a sentence of imprisonment for a time which may extend to one year or fine or both, which are the only sentences I can pass in this case under section 449 of the Criminal Procedure Code, the accused being European British subjects. If the accused are guilty they are guilty of a brutal assault which resulted in severe injuries to a Somali woman and ultimately in her death. I must consequently transfer this case to the High Court of Bombay under section 449 of the Criminal Procedure Code. The accused on being asked if they have any cause to show why the case should not be transferred to the High Court of Bombay, state that they have none.”

The accused were accordingly placed for trial before Batty, J.

A preliminary objection was raised that the Resident at Aden as the Sessions Judge had no jurisdiction to transfer the case to the High Court of Bombay.

Young, for the Crown.

Kirkpatrick, for the accused.

BATTY, J. :—The Magisterial enquiry in this case was conducted by Lieutenant-Colonel Davies, purporting to be District Magistrate at Aden, who, on the 13th August, 1904, under section 447 of the Criminal Procedure Code, committed the case to the Court of Session.

The Resident at Aden, after the accused persons had been placed at the Bar of his Court and claimed to be tried, and after perusal only of the proceedings before the Magistrate, passed an order in which he said that the offence with which the accused were charged and which appeared to be proved, could not be adequately punished by a sentence of imprisonment for a term which may extend to one year or fine or both, which were the only sentences he could pass in this case under section 449 of the Criminal Procedure Code, the accused being European British subjects, and that he therefore transferred this case to the High Court of Bombay under section 449 of the Criminal Procedure Code.

Now it has been urged on the part of the Crown that under section 20 of Act II of 1864 (being an Act for the administration of civil and criminal justice at Aden), the Resident at Aden is not a Court of Sessions but is a *persona designata* invested with specific powers described as all the powers of a Court of Session except as in that Act is otherwise provided. This contention appears to be correct.

[His Lordship read sections 22 & 23.]

The result of these sections is to except from regulation by the Code of Criminal Procedure, cases of European British subjects charged with offences which are not punishable with death and to render such cases triable by the Resident alone.

In these circumstances it appears that s. 449, sub-section 2 of the present Code of Criminal Procedure can have no application to the Court of the Resident at Aden, because that section contains provisions which are inconsistent with the provisions of s. 22 which declares imperatively that cases of the nature therein mentioned shall be tried by the Resident.

Section 17 declares that the administration of criminal justice in Aden is vested in the Court of the Resident except as in that Act is otherwise provided.

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And the result appears to be that the powers of the Court of Session conferred upon the Resident are not merely such as are defined in the Criminal Procedure Code but such as are provided expressly in the Act itself. Section 449 cannot affect those provisions.

It is contended on the part of the accused that the power to transfer a case under s. 449 (sub-section 2) conferred upon a Court of Session is one of those powers which s. 20 directs that the Resident shall exercise.

In the first place the provisions of s. 449, sub-section 2, impose a duty and it is doubtful whether a direction imposing a duty can be said to confer a power.

In the second place if it be a power, it is one which would be in conflict with the provisions of s. 22 of Act II of 1864 and as such, would be excepted from the powers conferred by s. 20 of that Act.

It may be that sub-section 1 of s. 449 of the Criminal Procedure Code enters into and forms part of the definition of the powers of a Court of Session within the meaning of s. 20 of Act II of 1864.

If so, there might be a limitation of the power of the Resident to pronounce on European British subjects any sentence exceeding one year's imprisonment.

And the result in that case would be that though the Resident would be competent to try a case in which European British subjects are charged with culpable homicide or grievous hurt, he would not be competent to pass sentences in excess of one year's imprisonment.

I mention this because it is possible that it may require consideration for the purposes of amending the provisions of Act II of 1864 in order to remove what at present seems an anomaly. But the phrase in s. 22 is imperative and it seems to me that a case of the nature now in question must be tried by the Resident and could not be transferred to this Court by him under s. 449, sub-section 2, of the Code of Criminal Procedure.

Counsel for the Crown has, however, intimated that it would be desirable that in this case this Court should exercise the power of transfer, and it is urged on behalf of the defence that

it would be a great hardship to the accused, if after coming all the way from Aden, they were not tried here but were sent back to the Court at Aden which has already expressed an opinion on the merits of that case.

The case appears to be one which it is very desirable should be transferred to this Court if this Court possesses the power.

Under clause 29 of the Letters Patent this Court is empowered to direct the transfer of any criminal case to any Court of any jurisdiction. There are no limitations in clause 29 such as are to be found in clause 13 of the Letters Patent relating to the power of transferring civil cases. And though it may be assumed that some limitation was implied in clause 29, there is no reason to suppose that the limits of this Court's power in this direction fall short of the utmost extent of its criminal jurisdiction.

[His Lordship read clause 27 of the Letters Patent.]

Assuming that Aden is a settlement administered by the Governor of Bombay in Council it would follow that the criminal Court of the Resident at Aden would be within the limits of the appellate jurisdiction of the High Court of Bombay.

But it has also been judicially decided in the case of *Abdul Karim v. Municipal Officer, Aden*,⁽¹⁾ that this Court has power to remove a civil suit from the Court of the Resident and to try and determine the same, and that the civil Court at Aden is subject to the superintendence of the High Court of Bombay.

That being so, as the provisions in clause 29 of the Letters Patent contain no words of limitation, it follows *a fortiori* that they cannot be more restricted in their operation than clause 13 of the Letters Patent, where the words of limitation expressly restrict the power of transfer to cases pending in Courts over which this High Court has superintendence.

The latter part of the preamble to Act II of 1864, which I now read, shows that it was the intention of the Legislature to confer on this Court powers of superintendence in respect of the Court of Aden.

For all these reasons I think this Court has the power to transfer the case in question.

(1) (1903) 27 Bom. 575 ; 5 Bom. L. R. 562.

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That a single Judge has the power to make this transfer is decided by the case of *The Queen v. Ameer Khan*⁽¹⁾.

I, therefore, direct that the case of *Emperor v. Robert Comley and others* be transferred to this Court.

[The trial then proceeded.]

Attorney for the Crown:—*The Public Prosecutor.*

Attorneys for the accused:—Messrs. *Crawford, Brown and Co.*

R. R.

ORIGINAL CIVIL.

1904.

December 12.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

THE MUNICIPAL CORPORATION OF THE CITY OF BOMBAY (ORIGINAL DEFENDANTS), APPELLANTS, v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL PLAINTIFF), RESPONDENT.*

Landlord and tenant—Crown land—St. 22 and 23 Vic. c. 41—Specific Performance—Interests unknown to the law—Improvements—Equitable rights of tenant—Estoppel.

In 1865, the Government of Bombay decided to construct an Eastern Boulevard in the City of Bombay.

In accordance with this decision, a letter was addressed to the Municipal Commissioner, requesting him to remove certain fish and vegetable markets from the site of the proposed Boulevard.

On the 17th November, 1865, the Municipal Commissioner replied, that the markets were vested in the Corporation of Justices, but that he was willing to vacate certain Municipal stables, which occupied a portion of the proposed site, if the Government would rent other land, mentioned in his letter, to the Municipality, at a nominal rent, the Municipality undertaking to bear the expense of levelling the same.

The Municipal Commissioner by paragraph 8 of his letter requested permission to erect on such land "Stables of wood and iron with rubble foundations, to be removed at six months' notice, on other suitable ground being provided by Government."

The land referred to by the Municipal Commissioner was Crown land, which vested in Her late Majesty by the operation of the Statute 21 and 22 Vic. c. 106.

The Municipal Commissioner's application was referred to the Architectural Improvement Committee and on the 5th of December, 1865, the Secretary to that

(1) (1871) 7 Beng. L.R. 240.

* Suit No. 902 of 1901; Appeal No. 1338.