

*Privy Council Appeal No. 171 of 1919.*

Bugga and others - - - - - *Appellants*

*v.*

The King-Emperor - - - - - *Respondent*

FROM

THE MARTIAL LAW COMMISSIONERS AT LAHORE.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 20TH FEBRUARY, 1920.

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*Present at the Hearing :*

VISCOUNT CAVE.

LORD MOULTON.

SIR JOHN EDGE.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

[*Delivered by* VISCOUNT CAVE.]

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This is an appeal by special leave from a judgment dated the 2nd June, 1919, of a Commission appointed under the Martial Law Ordinances of 1919 and sitting at Lahore. By that judgment twenty of the twenty-one appellants were convicted of offences under Section 121 of the Indian Penal Code, that is to say, of waging or attempting to wage war against the King or abetting the waging of such war, and were sentenced to death and forfeiture of property ; but it is understood that as to some of them the death sentence has since been commuted. The remaining appellant, Ghulam Hassan, son of Makham, was convicted of an offence under Section 412 of the same Code, that is to say, of receiving stolen property from dacoits, and was sentenced to rigorous imprisonment for seven years. The question raised on the appeal is as to the competency of the Commission to try the appellants for those offences.

The facts may be stated as follows : At the end of March and during the first days of April, 1919, there was serious unrest in certain parts of the province of the Punjab, and this unrest culminated on the 10th April in the outbreak of open rebellion at Amritsar in that province and elsewhere, and the offences of which the appellants have been found guilty were committed at Amritsar on that date. The occurrences of the 10th April are stated in the judgment of the Commissioners as follows :—

“ On April 10th, 1919, about noon, after the arrest of Kitchlew and Satyapal, disorder broke out in Amritsar, in the course of which an attempt was made to invade the Civil Station by a mob which had to be turned back by fire from troops and police. Shortly after this a mob attacked the National Bank situated in the City, brutally murdered Mr. Stewart, manager, and Mr. Scott, assistant manager, sacked and burnt the bank, and looted the godown, which contained cloth and other goods to the value of several lakhs of rupees. The Chartered and Alliance Banks were subsequently sacked. A Mission Hall, Church and the Religious Book Society's Depôt were also attacked and burnt by the mob. There was no reason why these institutions should have been singled out by the mob or their leaders except that, as the evidence shows, they were out to destroy the visible manifestations of British connection with the country.”

It was proved that the appellants, with the possible exception of Ghulam Hassan, were members of the mob and took an active part in the attack on the National Bank, and there was evidence that some of them took part in the actual murder of the manager and assistant manager. Bugga and Ratan Chand appear to have been the ringleaders. Ghulam Hassan was found in possession of property looted from the Bank. Bugga was arrested on the 12th April and the other appellants on subsequent dates. None of them were taken in arms or in the act of committing the offences with which they were charged.

On the 13th April the Governor-General in Council, acting under the Bengal State Offences Regulation No. X of 1804 (which was extended to the Punjab by the Punjab Laws Act, 1872) made an order whereby, after reciting that he was satisfied that a state of open rebellion against the authority of the Government existed in the districts of Lahore and Amritsar, he suspended the functions of the ordinary Criminal Courts within those districts as regards the trial of persons of the classes referred to in the Regulation taken in arms in open hostility to the British Government or in the act of opposing by force of arms the authority of the same, or in the actual commission of any overt act of rebellion against the State, or in the act of openly aiding and abetting the enemies of the British Government within those districts, and established Martial Law within those districts ; and by the same order he directed the immediate trial by Courts-Martial of all such persons. Similar orders were subsequently made in respect of the districts of Gujranwala and Gujrat.

On the 14th April the Governor-General, acting under Section 72 of the Government of India Act, 1915, made and promulgated the Martial Law Ordinance No. 1 of 1919, whereby it was

provided that every trial in the districts of Lahore and Amritsar held under the Bengal State Offences Regulation, 1804, should, instead of being held by a Court-Martial, be held by a Commission consisting of three persons appointed in this behalf by the Local Government. It was provided that at least two members of every such Commission should be persons who had served as Sessions Judges or had such other legal qualification as therein mentioned. It was also provided that a Commission should have the powers of a general Court-Martial under the Indian Army Act, 1911, and should follow so far as might be the procedure prescribed by that Act, but power was reserved to the Local Government to direct that the Commission should follow the procedure of a summary general Court-Martial. The finding and sentence of a Commission not to be subject to confirmation by the military authorities. Section 7 of the Ordinance was as follows :—

“ 7. Save as provided by Section 6, the provisions of this Ordinance shall apply to all persons referred to in the said Regulation who are charged with any of the offences therein described, committed on or after the 13th April, 1919.”

By subsequent Ordinances the provisions of the above-mentioned Ordinance No. 1 of 1919 were extended to Gujranwala and Gujrat, and power was given to impose a minor punishment in lieu of the death sentence.

In pursuance of the above-mentioned Ordinance No. 1 of 1919, the Local Government of the Punjab duly appointed a Commission, consisting of Lieut.-Colonel A. A. Irvine, C.I.E., District and Sessions Judge ; F. W. Kennaway, Esq., I.C.S., District and Sessions Judge ; and I. C. Lall, Esq.

From the above statement it is clear that the appellants could not, if no further step had been taken, have been brought before the Commission for trial. They had not been taken in the act of committing any of the offences referred to in Regulation X of 1804, and the offences with which they were charged were committed before the 13th April, 1919, the date mentioned in Section 7 of the Ordinance. But on the 21st April, 1919, the Governor-General, acting under Section 72 of the Government of India Act, 1915, made a further Ordinance (referred to as Ordinance No. IV of 1919) in the following terms :

“ GOVERNMENT OF INDIA.

“ LEGISLATIVE DEPARTMENT.

“ NOTIFICATION.

“ *Simla, the 21st April, 1919.*

“ An Ordinance further to extend the Application of the Martial Law Ordinance, 1919.

“ WHEREAS an emergency has arisen which renders it necessary to provide that commissions appointed under the Martial Law Ordinance, 1919, shall have power to try persons and offences other than those specified in the said Ordinance :

“ Now, therefore, in exercise of the power conferred by Section 72 of the Government of India Act, 1915, the Governor-General is pleased to make and promulgate the following Ordinance :—

“ Ordinance No. IV of 1919.

“ *Short Title.*

“ 1. This Ordinance may be called the Martial Law (Further Extension) Ordinance, 1919.

“ *Commissions under Martial Law Ordinance, 1919, to try such cases as the Local Government may direct.*

“ 2. Notwithstanding anything contained in the Martial Law Ordinance, 1919, the Local Government may, by general or special order, direct that any commission appointed under the said Ordinance shall try any person charged with any offence committed on or after the 30th March, 1919, and thereupon the provisions of the said Ordinance shall apply to such trials accordingly, and a commission may pass in respect of any such offence any sentence authorised by law.

“ CHELMSFORD,

“ *Viceroy and Governor-General.*

“ H. M. SMITH,

“ *Offg. Secretary to the Government of India.*”

On the 22nd April the Governor-General in Council made a further order under Regulation X of 1804, whereby after reciting that he was satisfied that a state of open rebellion existed in the districts of Lahore, Amritsar, Gujranwala and Gujrat, he suspended the functions of the ordinary Criminal Courts in those districts in so far as trials held before Commissions in accordance with the provisions of Martial Law Ordinance No. IV of 1919 were concerned.

The Local Government of the Punjab was instructed by the Government of India that the Commissions appointed under Ordinance No. IV were to be used only for the trial of offences arising out of the recent disturbances.

The appellants having been charged with offences under various sections of the Penal Code, including Sections 121, 302 and 412, as having been committed on the 10th April, the Local Government, acting under Ordinance No. IV of 1919, directed that they should be tried by the Court of Commissioners appointed under Ordinance No. I sitting at Lahore with the powers of a summary general Court-Martial, and convened the Commissioners for that purpose. The trial accordingly took place on the 29th May and the following days, and judgment was pronounced on the 2nd June. The Commissioners, while convicting the appellants (other than Ghulam Hassan) of an offence under Section 121, added that certain of the accused could also be convicted under Section 302, *i.e.*, for murder, but that they saw no necessity to discriminate, especially as in circumstances like those before them there was only one possible penalty for the offence or offences committed. Thereupon special leave was obtained from the Board to present this appeal.

Before the hearing of the appeal it was suggested by counsel for the appellants that Ordinance No. IV of 1919 was capable of being construed as intended only to extend the operation of

Ordinance No. 1 to offences committed before the 13th April, but not earlier than the 30th March, and accordingly that this Ordinance (like Ordinance No. 1) applied only to persons taken in the act of committing one of the offences specified in Regulation X of 1804. In their Lordships' opinion the Ordinance cannot be so construed. It is introduced by a recital that an emergency has arisen which renders it necessary to provide that Commissions appointed under the earlier Ordinance shall have power to try persons and offences other than those specified in that Ordinance ; and it empowers a Commission to try any person charged with any offence committed after the specified date, and to pass in respect of such offence any sentence authorised by law. It would be difficult to find words indicating more clearly that the operation of the Ordinance is not to be confined to the persons and offences described in the earlier Ordinance.

It was then argued that, if Ordinance No. IV applied (subject to the direction of the Local Government) to any person and to any offence known to the law, it was invalid by reason of the provisions of Section 65, Sub-sections (2) and (3) of the Government of India Act, 1915 ; and this contention, upon which the argument for the appellants mainly rested, must now be examined.

Section 65, Sub-section (2), when read with Section 72, prevents the Governor-General from making—

“any law affecting the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or affecting the sovereignty or dominion of the Crown over any part of British India.”

It was contended that the Ordinance under consideration, by depriving British subjects in India of the right to be tried in the ordinary course by the established Courts of Law, affected the unwritten laws or constitution whereon the allegiance of His Majesty's subjects in India depends, and was accordingly invalidated by the sub-section last referred to ; and reference was made to *Calvin's case* (7 Rep., 5) and to the maxim “*protectio trahit subjectionem et subjectio protectionem.*” It is not easy to understand how the substitution for the ordinary Indian Courts—which are themselves of statutory origin—of another tribunal of a judicial character, can be said to affect in any way the unwritten laws or constitution of the country ; but, apart from this observation, the argument appears to rest upon a misconception as to the meaning and effect of the sub-section. The sub-section does not prevent the Indian Government from passing a law which may modify or affect a rule of the constitution or of the common law upon the observance of which some person may conceive or allege that his allegiance depends. It refers only to laws which directly affect the allegiance of the subject to the Crown, as by a transfer or qualification of the allegiance or a modification of the obligations thereby imposed. In the case of *In re Ameer Khan* (6 Bengal Law Reports, 392, 459), the meaning of a similar provision in the Act of 1833 (3 and 4 Wm. IV, c. 85, sec. 43)

was discussed at length, and Mr. Justice Phear stated his opinion as follows :—

“ But I think it right to say that in my judgment the words ‘ whereon may depend, &c.,’ do not refer to any assumed conditions precedent to be performed by or on behalf of the Crown as necessary to found the allegiance of the subject, but to laws or principles which prescribe the nature of the allegiance, viz., of the relations between the Crown on the one hand and the inhabitants of particular provinces, or particular classes of the community, on the other ; and obviously such laws and principles as these are not touched by the local Acts which are impeached before us.”

Since that judgment was pronounced the provision so interpreted has been re-enacted substantially in the same terms in the Acts of 1861 and 1915 ; and many statutes and ordinances have been passed in India which were similar in effect to the Regulation then under consideration. If their Lordships were to adopt the argument now pressed upon them, they would be casting doubt upon a long course of legislation and judicial decision which must be presumed to have been known to and in the view of the Imperial Parliament when the Act of 1915 was passed. (See *The Queen v. Burah*, L.R., 3 A.C., 889, 907.) Reference may also be made to the recent case of *Besant v. The Advocate-General of Madras* (L.R., 46 I.A., 176, 191), where a like argument was rejected by the Board. This argument, therefore, cannot prevail.

Turning now to Section 65, Sub-section (3), of the Act of 1915, that sub-section is as follows :—

“ The Governor-General in Legislative Council has not power, without the previous approval of the Secretary of State in Council, to make any law empowering any court, other than a high court, to sentence to the punishment of death any of His Majesty’s subjects born in Europe, or the children of such subjects, or abolishing any High Court.”

Upon this enactment it was argued that Ordinance No. IV, if it subjects any person whatever to be tried for his life by a Commission in lieu of the ordinary Courts of Law or Courts-Martial, is an infringement of the provision which prevents the Governor-General in Council from empowering any Court other than a High Court to sentence to death any of His Majesty’s subjects born in Europe, and accordingly that the Ordinance is void not only as to persons falling within Sub-section (3) but altogether. The answer to this contention is to be found in Section 2 of the Government of India (Amendment) Act, 1916, which provides that there shall be inserted at the end of Section 84 of the Act of 1915 the following words :—

“ A law made by any authority in British India and repugnant to any provision of this or any other Act of Parliament shall, to the extent of that repugnancy, but not otherwise, be void.”

It appears to their Lordships that if the Ordinance in question in this case contravenes Section 65 (3) of the Act of 1915, it may properly be described as “ repugnant ” to that section so far as British-born subjects are concerned, and if so it is void to the extent of that repugnancy, but not otherwise. This argument, therefore, also fails.

For the above reasons their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed. There will be no order as to costs.



In the Privy Council.

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BUGGA AND OTHERS

*v.*

THE KING-EMPEROR.

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DELIVERED BY VISCOUNT CAVE.

Printed by Harrison & Sons, St. Martin's Lane, W.C.  
1920.