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**Court :** Chennai

**Decided On :** Sep-06-1882

**Reported in :** (1884)ILR6Mad32

**Judge :** Innes, Officiating C.J. and ;Kernan, J.

**Appellant :** Sitapathi Nayudu

**Respondent :** The Queen

**Judgement :**

Innes, Officiating C.J.

1. This is an application in which we are asked to transfer the appeal of one Sitapathi Nayudu from the Court of the Sessions Judge of North Arcot to the High Court, and we have heard Mr. Gould, who makes the application, and the Government Pleader, Mr. Shephard, upon the question of our power to make the transfer. The Government Pleader intimated that, if the Court has the power, he was not instructed to oppose the exercise of the power, but he contended that it was not conferred either by the Criminal Procedure Code or by the Letters Patent.

2. Under Section 64\* of the Criminal Procedure Code the High Court has authority to transfer a criminal case or appeal from any Criminal Court subordinate to it to any other such Court (i.e., Subordinate Court) of equal or superior jurisdiction. It may also transfer a case for trial before itself. But it is clear, as Mr. Shephard contends, this transfer for trial is confined to cases which fall under the definition of

the word 'trial' in the Criminal Procedure Code, i.e., an original trial, not the hearing of an appeal. The entire context makes this apparent, so that it must be conceded that we have not the power under Section 64 of the Criminal Procedure Code now in force.

3. Then have we the power under the Letters Patent of 1865 ?

4. Section 29 runs: '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.'

5. The language is very comprehensive and contains no such express restriction as is to be found in the Criminal Procedure Code of 1872 now in force, confining the transfer of appeals to Courts subordinate to the High Court.

6. The Criminal Procedure Code of 1861, which was in force at the date of the first Letters Patent of 1862, conferred power on the Sadr Court in Section 35 'to direct the transfer of any criminal case or appeal from any Court subordinate to its authority to any other such Criminal Court of equal or superior authority 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,' etc. Then the 24 and 25 Victoria, Cap. 104, Section 9, vested in the High Courts to be erected under the forthcoming Letters Patent all the powers of the abolished Supreme and Sadr Courts, and therefore the powers under this Section 35 of the Criminal Procedure Code of 1861.

7. Now Section 35 of the Criminal Procedure Code already quoted is substantially the same as Section 28 of the Letters Patent of 1862 (or 29 of those of 1865) except that Section 35 of the Criminal Procedure Code clearly restricts transfers to Courts subordinate to the Sadr Court, while the language of the section of the Letters Patent is wide enough to admit of a more liberal construction. If it were intended that the High Court should exercise no wider power than that which was

conferred by Section 35, what could have been the object of expressing this in a separate section of the Letters Patent, since the Act 24 and 25 Victoria, Cap. 104, Section 9, operated to vest the power inherent at that time in the Sadr Court in the newly erected High Court? It might be contended that the object was to manifest an intention that this should be and continue an essential part of the jurisdiction of the High Court; but as Section 9 of the Act subjects the powers of the High Court under the Act and Charter to legislative alteration by the Governor-General in Council, there could have been very little use in repeating in the Letters Patent the declaration of a power already existing under the Criminal Procedure Code, and which in the ordinary course of new legislation might at any moment be withdrawn.

8. The existence of this section is consistent only with the intention to confer new and larger powers than the Sadr Court had theretofore exercised.

9. Section 29 of the new Letters Patent is a reproduction of Section 28 of the old Letters Patent. In *The Queen v. Ameer Khan* 7 B.L.R. 240 it was held that the High Court had power under the Letters Patent to transfer a criminal case for trial by itself. This case was decided when the Criminal Procedure Code of 1861 was in operation. If the decision be correct (and I am not aware that it has ever been questioned, and it has received legislative recognition as will be presently noticed), the principle of it holds good with reference also to appeals, and, I think, we are bound to hold that the decision is a correct interpretation of the then existing law.

10. It was contended, however, that assuming that the Letters Patent did confer the power they were held by that case to confer, subsequent legislation, viz., the enactment of the Criminal Procedure Code of 1872, has restricted that power by confining the authority to transfer appeals, to transfers from one Subordinate Court to another. As already stated, there is no doubt that that is the extent of the authority conveyed by Section 64 of that Code, but the question is whether the larger power under the Letters Patent is affected by the provisions of that section. Let us see whether the two sections cannot be read together so that the larger powers under the Letters Patent may stand. The legislature in 1872 could not have been unaware of, the decision in *The Queen v. Ameer Khan* 7 B.L.R. 240 and of the power of the High Court which that case expressly and impliedly involved. Had

it been intended to negative those powers by fresh legislation, negative words would have been used expressing clearly that it was not intended that the High Court should continue to retain those powers. But, in place of abridging the powers which that case declared the High Court to have, the Legislature adopted the ruling to the effect that the High Court can transfer to itself a criminal case for trial and embodied it in the Procedure Code of 1872. 'What they so enacted, however, did not go beyond the matter expressly decided in that particular case, and it is urged by Mr. Shephard that this is very strong to show that it was not the intention of the Legislature that the High Court should continue to have the same power in appeals, the expression as to original trials implying the exclusion of appeals as to which the section is silent. This would be so if negative words had been used, such for instance as if the section ran as follows: may transfer a Criminal Appeal from any Criminal Court subordinate to it to any other such Court of equal or superior jurisdiction, but not otherwise.' In such a case a repeal of the powers given by the Letters Patent might be implied, because the two provisions of the law could not then stand together. As it is, by reading the section of the Letters Patent and Section 64 of the Criminal Procedure Code as in pari materid the power in the High Court of transferring appeals to itself, may stand as an additional provision to Section 64 of the Criminal Procedure Code without any violence being done to that section.

11. The Letters Patent after issue became part of the Act of Parliament in pursuance of which they were issued, and in determining whether any portion of them has been repealed, we must apply the same rules as would be applied to the question whether any portion of an Act of Parliament has been repealed.

12. As was held in Forster's 11 Rep. 63 case and in many other subsequent cases statutes are not to be considered as repealed by implication unless the repugnancy between the new provision and a former statute be plain and unavoidable. We think, therefore, that the High Court has the power we are asked to exercise.

13. Upon the question whether we ought to exercise it, there are the following considerations. The public mind has for several months been in a state of

abnormal excitement about the convicted person. The most conflicting views have been entertained as to his conduct and character by various officials as is apparent from the reports published from time to time in the public journals. He is an old servant of Government who has been holding a very important post. And it seems desirable on all these accounts that the case should be transferred to the High Court, where it will have the advantage of being heard before two Judges of the highest tribunal instead of by the single Judge of the subordinate tribunal, whose decision as a Judge of an Appellate Court could not be expected to have the same weight as that of the High Court. The transfer is, we think, likely to tend to the quieting of the public mind and to be conducive to the interests of justice in that and other ways.

14. My learned colleague agrees with me in the expediency of the transfer, and we therefore propose to direct that the appeal be transferred for disposal to the High Court, to be heard before a bench of two Judges.

**Kernan, J.**

15. The power of transfer of appeal by the High Court, given by Section 29 of the Letters Patent, is one which may be exercised for much good, in a fit case. This power has not been taken away by the Criminal Procedure Code of 1872, and it is expressly provided in Section 526 of the Criminal Procedure Code of 1882.

\* High Court may transfer case or direct trial in district other than that in which offence was committed.

[Section 64 : Whenever it appears to the High Court that such order will promote the ends of justice, or tend to the general convenience of the parties or witnesses, it may direct the transfer of any particular criminal case, or appeal, or class of cases or appeals from a Criminal Court, subordinate to its authority, to any other such Criminal Court of equal or superior jurisdiction, or may order that any offence shall be inquired into or tried in any district or division of a district, other than that in which the offence has been committed, or that it shall be tried before itself. If the High Court withdraws any case from any other court for trial before itself, it shall observe the same procedure which that court would have observed if the case had

not been so withdrawn.

Provided that the orders issued under this section shall not be repugnant to orders issued by the Local Government under the last preceding section.]

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