

A.C. Tops Vs. Emperor

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Court : Kolkata

Decided On : Mar-07-1918

Reported in : AIR1919Cal444,(1919)ILR46Cal31,49Ind.Cas.913

Judge : Sanderson, C.J. and ;Woodroffe, J.

Appellant : A.C. Tops

Respondent : Emperor

Judgement :

Sanderson, C.J.

1. This was a Rule granted by my learned brother and me upon the petition of Aloysius Christoffel Tops on the 4th of March this year and directed to the District Magistrate of the 24-Parganahs to show cause why the said Aloysius Christoffel Tops should not be discharged from custody on the grounds mentioned in the petition or why this Court should not grant him such other relief as to this Court might seem fit. It was further ordered that a copy of the Rule and of the petition should be served upon the Superintendent and Remembrancer of Legal Affairs of the Government of Bengal and also upon the Consul for the Netherlands at Calcutta.

2. It appears that on the 4th May 1917 a requisition was sent by the Consul-General for the Netherlands to the Secretary to the Government of India, Foreign and Political Department, in these terms: 'Acting upon instructions received from

the Government of Netherlands, the East Indies, I have the honour to enclose herewith a legalised copy of a judgment of the Council of Justice at Batavia of 7th October 1916, No. 30B, by which Aloysius Christoffel Tops has been condemned to eight months imprisonment for theft and to request that the said Dutch subject, who was arrested sometime ago in Calcutta and is now on trial or undergoing punishment for the falsification of a cheque, may be extradited after the expiration of his imprisonment.

3. It appears that at that time the petitioner was undergoing a sentence of imprisonment in the Alipur Jail, he having been convicted at the High Court Sessions in February 1917 and sentenced to undergo one year's rigorous imprisonment. On the 9th December 1917, an application was made by Mr. Lodewyk Grommers, Consul for the Netherlands at Calcutta, for an immediate warrant of arrest against the said Aloysius Christoffel Tops. The application was based upon the allegations that Aloysius Christoffel Tops had been convicted in Batavia on the 7th October 1916 of theft, and sentenced to eight months' imprisonment, and that he had absconded from that place before serving the said sentence. It appears that the petitioner Aloysius Christoffel Tops was about to be released from Jail on the next day, the 10th of December, and upon the application of Mr. Grommers the Magistrate made an order that a warrant should issue under Section 4 of Act XV of 1903, the Indian Extradition Act, and further ordered that the issue of the warrant should be reported to the Local Government under Sub-section (2) of Section 4. The warrant was in these terms: 'Whereas Aloysius Christoffel Tops of the Central Jail, Alipur, stands charged with the offence of escaping from lawful custody at Batavia, Dutch East Indies, this is to authorise you to arrest the said Aloysius Christoffel and produce him before me.' On the 10th of December, Tops was brought before the Magistrate who recorded that he admitted that he had been sentenced to eight months for theft and that he had not served out the term. That admission was withdrawn subsequently, namely, on the 2nd of January this year, and Aloysius Christoffel Tops, the petitioner, has told us that he was suffering from nervousness and that what he had said had been misinterpreted. However, on the 10th of December, the Magistrate directed that Aloysius Christoffel Tops should be detained in the Alipur Central Jail pending the orders of the Government. On that day, the 10th of

December, the Secretary to the Government of India sent a direction to the Magistrate in these terms 'Whereas a requisition has been made to the Government of India by the Government of the Netherlands, East Indies, for the surrender of Aloysius Christoffel Tops, a Dutch subject and a fugitive criminal who has been condemned to eight months imprisonment for theft in Batavia, the Government of India hereby direct you under and in pursuance of Section 3(1) of the Indian Extradition Act (XV of 1903), to make such enquiries into the facts of the case and generally to take such steps as are authorised under the said Act, and to report the result of your enquiry as there indicated.' Therefore, it appears that the proceedings were originated by the Magistrate issuing a warrant under Section 4 of the Act, but that after the direction from the Government of India, on the 10th December 1917, the proceedings were continued under Section 3 of the Act.

4. The petitioner has been detained from the 10th of December until the present time, and he alleges before us, that he is wrongly detained and that this Court ought to make an order for his discharge.

5. The first ground on which the petitioner relies in his petition is that the offence for which he was arrested is not an extraditable offence. It appears that a warrant was issued authorising, as I have already mentioned, the person to whom it was addressed to arrest him, because he had escaped from lawful custody in Batavia. It was, however, based upon a complaint, as I have already pointed out, by Mr. Grommers alleging that Aloysius Christoffel Tops had been convicted for theft in Batavia and the direction of the Government of India recited the fact that he had been condemned to eight months' imprisonment for theft in Batavia. Consequently, it appears that the offence in respect of which the Consul-General for the Government of the Netherlands is asking for this extradition, is that of theft. That offence, in my opinion, is an extraditable offence. It is mentioned in the schedule to the English Act of 1870; and the offence of larceny appears in Article (2) of the Treaty with the Netherlands Government. Consequently the offence in respect of which these extradition proceedings have been taken is an extraditable offence.

6. The second ground on which the petitioner relies, is, that the time during which he was liable to be detained has expired and he relies upon Sub-section (10) of Section 3. I think that he has perhaps misunderstood the nature of the proceedings and consequently has laid greater stress upon this point than lie otherwise would have done. Sub-section (10) of Section 3 is as follows: 'If such a warrant as is prescribed by Sub-section (8) is not issued and executed in the case of any fugitive criminal, who has been committed to prison under Sub-section (4) within two months after such committal, the High Court may, upon application made to it on behalf of such fugitive criminal, and upon proof that reasonable notice of the intention to make such application has been given to the Government of India or the Local Government as the case may be, order such criminal to be discharged, unless sufficient cause is shown to the contrary.' It is, therefore, necessary to see whether Aloysius Christoffel Tops has been committed to prison under Sub-section (4) of this section. Sub-section (4) is as follows:--'If the Magistrate is of opinion that a prima facie case is made out in support of the requisition, he may commit the fugitive criminal to prison to await the orders of the Government of India or the Local Government, as the case may be.' Now it appears, as I have already said, that although the petitioner at first apparently admitted that he was the person mentioned in the requisition, he subsequently withdrew that statement and denied his identity with the person who was referred to in the requisition and that when a witness was called to identify him as being the man who was referred to in the requisition, and who had been convicted in Batavia, he cross-examined him to show that the witness was not a reliable witness, inasmuch as the witness was not present at the time of the conviction, with the result that the Magistrate was not satisfied about the identity and further adjourned the case. The result has been that the Magistrate has not acted under Sub-section (4) of Section 3 and the petitioner has not been committed to prison, because the Magistrate has not yet been satisfied that a prima facie case has been made out in support of the requisition. Consequently he has not been committed to prison under Sub-section (4); and it further follows that the warrant which is referred to in Sub-section (10) which is the warrant prescribed by Sub-section (8), namely, a warrant for the surrender of the person for whom extradition has been asked for, has not and could not have been issued under Sub-section

(8); and consequently the petitioner cannot rely, in my judgment, upon Sub-section (10) of Section 3, because the warrant has not and could not have been issued within two months after the committal, inasmuch as such committal has not taken place. For these reasons I think the second point on which the petitioner relies, fails.

7. I ought to have said perhaps in dealing with this point, that there seems to be, in addition to the question of identity some question as to, whether the sentence which was passed upon the petitioner was one which was passed as it is said, in contumacium. If it was, then such sentence is not deemed for the purpose of extradition proceedings, a conviction. But a person so sentenced must be dealt with as an accused person. Then there are certain proceedings with regard to the dealing with an accused person which are set out--and which I need not state in detail--in Article 8 of the Treaty with the Government of the Netherlands. That may have been a further reason for the delay which has occurred in this matter.

8. The third point upon which the petitioner relies is that there was some question of law of unusual difficulty which had arisen in the case, and that therefore this Court should transfer the case under Section 526 of the Criminal Procedure Code to this Court. I am not at present satisfied that this Court would have any jurisdiction to act under Section 526, having regard to the decision in *Rudolf Stallmann v. Emperor* (1911) I.L.R. 38 Calc. 547: but I do not wish to express any definite opinion upon that point because I do not think that it is necessary for my judgment in this case. It is sufficient for me to say that even if we assume that we have jurisdiction to act under Section 526, I do not think that any case has been made out to justify us in exercising that jurisdiction, and in ordering a transfer of the case from the Magistrate's Court to the High Court.

9. The next point upon which the petitioner relied in his petition was, that a writ of Habeas Corpus should issue. Such an application must be based upon proof that the petitioner was detained unlawfully in custody. But as I have already shown in the earlier part of my judgment, the petitioner is not unlawfully detained in custody. Therefore there is no ground for the issue of a writ of Habeas Corpus. I do not say anything about the question of the jurisdiction of this Court to issue a writ of

Habeas Corpus when a person applying for it is outside the limits of the original jurisdiction of this Court. It is not necessary for me to express any opinion upon that point in this case because, assuming that we have such jurisdiction, as I have already said, this is not in my judgment a case in which we would be justified in exercising it.

10. Finally, the petitioner urged that the Court ought to grant him bail. A Magistrate has dealt with this matter already on two occasions. The first occasion was on the 3rd of January. The order which he made is as follows: 'The petitioner has just served out a term of imprisonment for a serious offence. If he turns out to be the individual of the same name who was convicted in Batavia, he is an habitual criminal of a dangerous type as well as a fugitive from justice. I cannot allow bail.' And on a further application for bail, the Magistrate said: 'I am not prepared to give bail in the circumstances. The prisoner is alleged to have committed theft in the Dutch East Indies and to have absconded before serving his sentence. It is not safe to allow him out of custody pending decision of the charge against him.'

11. It, therefore, appears that this application was dealt with by two Magistrates who have enquired into the circumstances, and each Magistrate has dismissed it. I have carefully considered all the circumstances and I see no reason to interfere with the decision at which the Magistrates have arrived.

12. For these reasons, I think that the Rule should be discharged.

Woodroffe, J.

13. I agree. I would only add with regard to bail that apart from the merits, it seems to me to be doubtful whether this Court can grant bail: for, if, as has been held, this Court has no general superintendence over extradition proceedings such as those now before us, it would seem to follow that it would not have under the circumstances such as exist in this case, what is, after all, an accessory jurisdiction, namely, to grant bail. However this may be, I agree that the facts do not justify a dissent from the order passed by the Magistrate.

14. I think that the proceedings should be pushed on as quickly as possible, and if in fact there is unnecessary delay in the matter, it will be open to the applicant to apply to the Magistrate to forward his representation to Government.

Sanderson, C.J.

15. I entirely agree with what has been said by my learned brother that there should not be any further delay in the prosecution of these proceedings, which is avoidable.

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