**In Re: Horace Lyall**

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**Court** : Kolkata

**Decided On :** Jan-09-1902

**Reported in** : (1902)ILR29Cal286

**Judge** : Francis W. Maclean, ;K.C.I.E., C.J., ;Ghose, ;Banerjee, ;Hill and ;Brett, JJ.

**Appellant** : In Re: Horace Lyall

**Judgement** :

Maclean, C.J.

1. This is an appeal from a decision of Mr. Justice Stevens sitting in the exercise of the original criminal jurisdiction of the High Court to hear an application by the prisoner under Section 491 of the Code of Criminal Procedure, an application by which he asks that he should be brought up before the Court to be dealt with according to law, and that he should be set at liberty. Mr. Justice Stevens refused the application; hence the present appeal.

2. The circumstances under which the application was made are set out in the affidavit of the petitioner, dated the 9th December 1901, which is as follows:

1. That on the 2nd day of December instant, on the hearing of a reference from the Deputy Commissioner of Nowgong, I was sentenced by the High Court of Judicature at Fort 'William in Bengal in its Criminal Appellate Jurisdiction to undergo simple imprisonment for a period of one month, and to pay a fine of Rs. 1,000, or in default to undergo simple imprisonment for a further period of one

month.

2. That in order to avoid going to Assam, I applied, on the 5th December instant, to their Lordships, Mr. Justices Prinsep and Stephen, to order my committal to the Presidency Jail in Calcutta, but their Lordships were pleased to direct that upon my surrender under their said order, a warrant of commitment should issue to the Superintendent of the Jail at Alipore, notwithstanding that my Counsel had argued that the Court had no jurisdiction to commit me to the Alipore Jail, which is beyond the limit of the local jurisdiction of this Hon'ble Court.

3. That on the 9th day of December instant, I appeared before their said Lordships in the High Court and surrendered to the said Court, and I was, thereupon, taken by an officer of police to the Registrar of the said Court, and thereafter the police officer was furnished with a writ addressed to the Superintendent of the Jail at Alipore in the district of the 24-Parganas, and I was taken by the said police officer to the said jail, and from thence, as I am informed and verily believe, under orders of the Government of Bengal, I have been removed to the Presidency Jail in Calcutta in which I am at present detained.

4. That the Alipore Jail is, as I am informed and verily believe, beyond and out of the local jurisdiction of this Hon'ble Court.

5. That I am informed and verily believe that under the powers given to the Government of Bengal in that behalf, the Government of Bengal, as appears by the Calcutta Gazette, 1873, Part I, page 68, issued a notification appointing certain; ails as places in which European British subjects might be confined, and that the Alipore Jail was not one of such places, and I am advised that the commitment of European British subjects thereto is illegal.

6. That I am advised and verily believe that the order under which I was taken in custody before the said Registrar, and the order under which I was committed to the Superintendent of Jail at Alipore, is illegal, unlawful and irregular, and that the said orders and all proceedings taken and documents issued and things done under such order or under colour thereof should b' quashed, and that I should be ordered to be brought up before this Hon'ble Court to be dealt with according to

law, and that I should be set at liberty.

3. It will be gathered from the terms of that affidavit that the petitioner's complaint is that the Court which sentenced him, and which was sitting as he tells us, and properly; in the exercise of its criminal appellate jurisdiction, or in strictness as a Court of Reference under Section 307 of the Code, had no jurisdiction to send him to the jail at Alipore on the ground that it was beyond the limits of the local jurisdiction of the Court, and upon the further ground that he being an European British subject, his commitment to that jail was illegal.

4. It will be noticed that in the affidavit and in the grounds of appeal, much stress has been laid upon the alleged fact that the Alipore Jail is not a jail in which an European British subject can properly be confined. Now, in this connection, Section 541 of the Code of Criminal Procedure says this:

Unless when otherwise provided by any law for the time being in force, the Local Government may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined.

5. And under a notification duly made and published in the Calcutta Gazette in 1873, certain jails were mentioned in which European British subjects might be confined, and the jail at Alipore is not one of them. When the Rule was issued, we were under the impression that such was the fact. It has, however, subsequently transpired, and this has not been questioned, as a matter of fact, that, under a notification of the Local Government of 1896, that Government has directed that the jail at Alipore, to which the petitioner was sent, shall be a jail in which an European British subject may be confined. With these fresh materials before us, any argument which was previously based upon its not being such a jail can now be of no avail.

6. These being the facts of the case, the first question we have to consider is, whether an appeal from the decision of Mr. Justice Stevens does or does not lie and, to my mind, the answer to that question is dependent upon the true construction of Section 15, of the Letters Patent of 1865.

7. The present application is made, as I have already said, under Section 491 of the Code of Criminal Procedure, which, so far as is material for present purposes, runs as follows:

Any of the High Courts of Judicature at Fort William, Madras, and Bombay, may, whenever it thinks fit, direct (a) that a person within the limits of its ordinary original civil jurisdiction be brought up before the Court to be dealt with according to law; (b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty.

And by the rules of the High Court passed under the corresponding section of the Criminal Procedure Code of 1875, and now repealed, and which rules are still in force, it is provided as follows: 'Every application to bring up before the Court a person alleged to be illegally or improperly detained in custody shall be supported by affidavit or affirmation, stating where and by whom the person is detained in custody, and (so far as they are known) the facts relating to such detention, with the object of satisfying the Court that there is probable ground for supposing that such person is detained in custody against his will and without just cause.

8. Reliance, too, is placed by the present appellant upon Section 456 of the Code of Criminal Procedure, which runs as follows:

When any European British subject is unlawfully detained in custody by any person, such European British subject or any person on his behalf may apply to the High Court which would have jurisdiction over such European British subject in respect of any offence committed by him at the place where he is detained, or to which he would be entitled to appeal from any conviction for any such offence, for an order directing the person detaining him to bring him before the High Court to abide such further order as it may pass.

9. In dealing with the question whether an appeal does or does not lie, we must first consider whether the decision of Mr. Justice Stevens was a 'judgment' (not being a sentence or order passed or made in any criminal trial) within the meaning of Section 15 of the Letters Patent. In my opinion the decision was certainly a judgment. It dealt, and so far as the learned Judge was concerned, finally dealt,

with a matter of most grave import to the prisoner himself and with one of the most important questions that can ever occupy the attention of a Court of justice, namely, that of the liberty of the subject. It is true that the application, which practically was one for the issue of a writ of Habeas Corpus, was made in this instance to the Judge who was exercising the ordinary original criminal jurisdiction of this Court, and it is contended by the learned Advocate-General that the appeal provided for by Section 15 of the Letters Patent is confined to judgments passed in civil cases, and that there is no appeal under this section from any judgment passed in any criminal matter, or by a Judge exercising the ordinary original criminal jurisdiction of the Court. He relies not only upon the language of the section itself, but upon its situation in the Letters Patent, being in that portion which is headed and is dealing with 'The Civil Jurisdiction of the High Court.' For the appellant, on the other hand, it is contended that the expression 'judgment' must mean every judgment which is not a sentence or order passed or made in any criminal trial, and that the order in the present case dismissing the application was not one made in a criminal trial. It is further pointed out that there are special provisions in the same Letters Patent--I am referring to Sections 25 to 28 inclusive, which provide for reviews and appeals in the case of criminal trials from the High Court exercising original criminal jurisdiction, and in those from the Criminal Courts in the provinces, and from this it is argued that the term 'judgment' must include every judgment which is not specially dealt with by the sections I have just cited, even though it be one in a criminal matter as opposed to a criminal trial. It is clear that by making his application before Mr. Justice Stevens the applicant regarded it as one made in a criminal proceeding, and in this he would appear to be right; see Ex parte Alice Woodhall (1888) L. R. 20 Q. B. D. 832. A writ of Habeas Corpus may be granted in a civil proceeding or in a criminal proceeding; see per Cotton L. J., The Queen v. Barnardo (1889) L. R. 23 Q. B. D. 305., and here it was applied for in a criminal proceeding.

10. I have felt some doubt as to whether Mr. Justice Stevens, who had, as I have said, been appointed to exercise the ordinary original criminal jurisdiction of the Court, was the proper Judge to whom the application should have been made; but apparently in the case of In the matter of Shoibalini Dassee (1898) 2 C. W. N. CCCXXXIII. it was considered, after discussion, that the Judge so appointed was

the proper person to deal with the application, upon the footing, I presume, that it was made in a criminal proceeding or matter.

11. I do not see why, in the present case, we should not construe Section 15 literally, and upon the best consideration I can give to this part of the case, I think the argument of the appellant should prevail, and that an appeal will lie. The case in the Bombay High Court, In the matter of Narrondas Dhanji (1890) I. L. R. 14 Bom. 556., is scarcely in point, as the application then was in a civil and not in a criminal matter.

12. We have been referred to certain cases in the Courts of England and especially to that of Cox v. Hakes (1890) L. R. 15 App. Cas. 506. and Ex parte Alice Wood-hall (1888) L. R. 20 Q. B. D. 832. These cases have no very direct bearing upon the point immediately under discussion. They turn in a great measure upon the construction of certain sections of the Judicature Act of 1873, the language of which is materially different from that of the sections of the Letters Patent, to which I have referred. In the case of Cox v. Hakes (1890) L. R. 15 App. Cas. 506. it was held that, upon the true construction of Section 19 of the Judicature Act, 1873, the Court of Appeal had no jurisdiction to entertain an appeal when a person had been discharged from custody by an order of the High Court under a Habeas Corpus. Section 19 is as follows:

The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice or any Judges or Judge thereof.

13. The exception material for the present question is in the last clause of Section 47. It was held by the majority of their Lordships in that case that, although the words of Section 19 literally construed were sufficient to comprehend the case of an order of discharge made upon an application for discharge upon a writ of Habeas Corpus in a civil matter, yet that, looking at the object of the statute and looking at its general purpose and intent, that particular case did not, upon its true construction, come within the section. Cox v. Hakes (1890) L. R. 15 App. Cas. 506., however, was the converse of the present case, for there it was an appeal against an order of discharge: here it is an appeal against an order refusing to

discharge, and in Cox v. Hakes (1890) L. R. 15 App. Cas. 506. Lord Herschell carefully guarded himself from saying that an appeal would not lie in the case of an order refusing to discharge the applicant. At p. 535 His Lordship says:

The remedy of Habeas Corpus would be sought in the majority of cases in a criminal cause or matter where admittedly no appeal has been given. It will be seen that the reasoning which has led me to the conclusion that an appeal will not lie from an order discharging a person from custody under a writ of Habeas Corpus has no application to an appeal from an order refusing to discharge the applicant. I intend to express no opinion whether there is an appeal in such a case. That question does not arise here, and any opinion expressed upon it would be extra-judicial. I refer to it only because it was suggested that, if there was an appeal in the one case, it was scarcely to be conceived that there should not be an appeal in the other. I do not think so. There would be to my mind nothing surprising if it should turn out that an appeal lay by one whose discharge had been refused, but that there was no appeal against a discharge from custody. It would be in strict analogy to that which has long been the law. The discharge could never be reviewed or interfered with; the refusal to discharge, on the other hand, was always open to review; and although this review was not, properly speaking, by way of appeal, its practical effect was precisely the same as if it had been.

14. And Lord Morris says at p. 538:

That under Section 19 an order refusing a writ of Habeas Corpus is appealable from and can be heard and determined by the Court of Appeal, was not argued against at your Lordship's Bar on the part of the appellant, and could scarcely, in my opinion, be so argued after the various decisions on such appeals in the Court of Appeal and in your Lordship's House.

15. The case of Ex parte Alice Woodhall (1888) L. R. 20 Q. B. D. 832., in which it was held that there was no appeal against an order refusing an application for a writ of Habeas Corpus in a criminal matter, turned upon the construction of Section 47 of the Judicature Act, 1873, where the words are

No appeal shall lie from any judgment of the said High Court in any criminal cause or matter.

16. The language of Section 15 of the Letters Patent is

Order. . . . . made in any criminal trial.

17. There is an obvious distinction.

18. As I have said, then, in my opinion an appeal lies.

19. Passing now to the merits, the case came before this Court on a reference under Section 307 of the Code of Criminal Procedure,' and it properly came before the Division Bench, which was sitting to dispose of criminal appeals and references. That Court convicted the petitioner and passed sentence upon him, and under Section 383 of the Code, the Court passing the sentence is forthwith to forward a warrant to the jail in which the accused is, or is to be, confined, and, unless he is already confined in such jail, shall forward him to such jail with the warrant. The Court here was sitting not in the exercise of its ordinary original criminal jurisdiction, but as a Court of Reference in a criminal matter, and, inasmuch as the Alipore Jail was within the jurisdiction of the Court sitting in the character I have mentioned, and is a jail in which a European British subject may be confined, I fail to see that there was any illegality in the Court directing that the accused should be confined in that jail, and in issuing a warrant with that object.

20. If, then, there was nothing illegal in the Court sending the petitioner to the Alipore Jail, it becomes of little importance to consider whether the Court could have sent him to the Presidency Jail, for I can see nothing in the Prisoners Act (III of 1900) to make it compulsory upon such a Court as passed the sentence in this case to direct that the prisoner should be imprisoned only in the Presidency Jail. It has been admitted that Section 5 of the Prisoners Act does not apply to the circumstances of the present case, and it is clear that Sections 7 and 8 of that Act apply only to eases where the prisoner is sentenced by the High Court in the exercise of its original criminal jurisdiction.

21. It has been urged before us that in the present case the Division Bench of the High Court was acting in the exercise of its original criminal jurisdiction, and not as a Court of Reference in a criminal matter, and that what occurred before the Division Bench was in effect a trial de novo by the High Court. I am unable to accede to this view, having regard to the fact that the case was a reference under Section 307 of the Code of Criminal Procedure. The difference between a Judge of the High Court sitting in the exercise of its original criminal jurisdiction and a Division Bench sitting on a reference under Section 307 in a criminal matter is well recognised.

22. Again, it is urged that the present case is covered by Section 9 of the Prisoners Act, hut I do not think that is so. If we look at Sections 7, 8, and 9 of that Act, a clear distinction is drawn between the case of a person who is 'sentenced' and that of a person who is 'committed.' Here Mr. Lyall was 'sentenced,' not 'committed,' and Section 9 does not apply. Moreover, in other respects, the language of that section does not point to cases where a sentence of imprisonment has been passed.

23. For these reasons the Rule must be discharged.

**Ghose, J.**

24. I agree with my Lord in holding that this Rule should be discharged, and generally for the reasons assigned by him.

25. The principal point urged by the learned Counsel for the appellant is that this Court, while passing sentence, was bound to have committed him to the Presidency Jail, and that it had no jurisdiction to commit him to the Alipore Jail. This is mainly based upon three grounds--(1) that the Court should be regarded as a Court exercising original criminal jurisdiction; (2) that the Alipore Jail is beyond its jurisdiction; and (3) that the Alipore Jail is not one of the jails appointed by Government under Section 541 of the Code for confinement of European prisoners. It will be observed that this Court, as a Court of original criminal jurisdiction, had no jurisdiction in respect of the offence committed by the prisoner, and the case came before this Court as a Court of Reference from a Criminal

Court subject to its appellate jurisdiction, as indicated by Section 28 of the Letters Patent and the sentence that was passed was as such Court of Reference.

26. It seems to me that when the reference was from a Court subject to its appellate jurisdiction, the simple fact of this Court having passed sentence in the case would not convert the Court from a Court of Reference to one of original jurisdiction. If the contention were correct, it might well be said that a sentence passed by the High Court, while sitting on appeal, against an order of acquittal is also as a Court of original jurisdiction--a proposition which is obviously untenable. Then, as regards the Alipore Jail, it is, as has been pointed out by the learned Chief Justice, within the appellate jurisdiction of this Court, and it is also a jail where, under the notification of Government, an European prisoner may be confined. It is therefore perfectly clear that the warrant committing the prisoner to the Alipore Jail is legal.

27. In the views expressed by the learned Chief Justice, in which I agree, it is not necessary to discuss the question whether, supposing the contention of the learned Counsel were correct, the committal of the prisoner to a wrong jail--the sentence passed being perfectly legal--was without jurisdiction, and whether, in the circumstance that the prisoner has been, under the orders of Government, transferred to the very same jail where he contends he should have been committed, Mr. Justice Stevens was entitled to exercise the discretion which he has exercised in refusing the writ of Habeas Corpus that was applied for. I might, however, say that it seems to me to be extremely doubtful whether the question is one of jurisdiction, or it is simply one of procedure. If it is of the latter character, it is obvious that Mr. Justice Stevens was entitled to exercise the discretion (and there can be no doubt that he exercised it rightly) that he did exercise in this case.

28. I should add that I agree with the learned Chief Justice in holding that an appeal lies from the order refusing the writ applied for.

**Banerjee, J.**

29. I agree with the learned Chief Justice in thinking that this rule should be discharged.

30. It is a Rule calling upon the Superintendent of the Presidency Jail to show cause why a writ of Habeas Corpus should not issue for the release of the petitioner. The Rule was granted on the appeal of the petitioner against an order passed by Mr. Justice Stevens in the exercise 'of the ordinary original criminal jurisdiction of this Court refusing his application under Sections 491 and 456 of the Code of Criminal Procedure.

31. The contention on behalf of the petitioner is that he is entitled to be released, as he is in illegal custody, because the learned Judges of this Court who tried his case under Section 307 ' of the Code of Criminal Procedure had no power to send him to the Alipore Jail, which is outside the Presidency Town of Calcutta, and further because, even if they had jurisdiction to send anyone sentenced to imprisonment under that section to any jail outside the Presidency Town, they had no power to send the petitioner, who is an European British subject, to the jail at Alipore, which is not a jail appointed by the Local Government, under Section 541 of the Criminal Procedure Code, for the custody of European British subjects.

32. The learned Advocate-General in showing cause urges that there is no appeal against the order of Mr. Justice Stevens, and that, oven if that order is appealable, it is perfectly correct, and the learned Judges who sent the petitioner to the Alipore Jail had ample power to do so.

33. The questions that, therefore, arise for determination in this case are--First, whether an appeal lies from the order of a single Judge of this Court made in the exercise of its ordinary original criminal jurisdiction refusing an application by a prisoner for release from alleged illegal custody under a sentence of imprisonment passed by two other learned Judges; second, whether a, Division Bench of this Court sentencing a person to imprisonment under Section 307 of the Code of Criminal Procedure has power to send him to a jail outside the Presidency Town of Calcutta; third, whether, even if it has such power, it can send a European British subject to a jail not appointed by Local Government, under Section 541 of the Code of Criminal Procedure for the custody of that class of persons.

34. Upon the first question, it is argued for the petitioner that the order of Mr. Justice Stevens is a 'judgment not being a sentence or order passed or made in

any criminal trial' within the meaning of Clause 15 of the Letters Patent, and is appealable under that clause; and in support of this argument the cases of In the matter of Narrondas Dhanji (1890) I. L. R. 14 Bom. 555. and In the matter of Ameer Khan (1870) 6 B. L. R. 459. are referred to. On the other hand, the learned Advocate-General urges that the order appealed against is no judgment within the meaning of Clause 15 of the Letters Patent as explained in the case of The Justices of the Peace for the Town of Calcutta v. The Oriental Gas Company (1872) 17 W. R. 364., but is an ex parte order, there being no opposite party to it, and that, even if it be a judgment, it comes within the exception in the clause as being a judgment in a criminal case, and in support of this contention Ex parte Alice Woodhall (1888) L. R. 20 Q. B. D. 832. is relied upon.

35. The point is not free from difficulty, and the two cases relied upon by the learned Counsel for the appellant do not throw much light upon it, the case of In the matter of Narrondas Dhanji (1890) I. L. R. 14 Bom. 555. being a civil case and that of In the matter of Ameer Khan (1870) 6 B. L. R. 459. having expressly left the question, whether an appeal lies, undetermined. But after considering the arguments on both sides, the conclusion I come to is that the order complained of is appealable under Clause 15 of the Letters Patent. That order is, in my opinion, a judgment within the meaning of Clause 15 as explained in The Justices of the Peace for the Town of Calcutta v. The Oriental Gas Company (1872) 17 W. R. 364. and the recent case of Mussamut Brij Coomaree v. Ramrick Bass (1901) 5 C. W. N. 781. The order is 'a decision, which,' to use the language of Sir Richard Couch in the first-mentioned case, 'affects the merits of the question between the parties, namely, the petitioner and the Superintendent of the Presidency Jail, who holds him in custody, as to the right of the former to be released from that custody on. the ground of its being illegal custody. The fact of the order being an ex-parte one is immaterial to the present purpose, as the order determines as between the petitioner and his jailor the important question of his right to release from custody by an application under Section 491 of the Criminal Procedure Code as effectually against him as if it had been made after hearing the opposite party. Nor can it be said that the order comes within the exception in Clause 15, for it is not 'a sentence or order passed or made in a criminal trial.' The criminal trial, which resulted in the imprisonment of the petitioner, was over. Sentence had been

passed and carried into execution. The proceeding before Mr. Justice Stevens, though due to the result of that trial, cannot be regarded as a part or a continuation of it, and the order made in that proceeding cannot be treated as an order made in a criminal trial. The application, it is true, was made to a learned Judge who was exercising the ordinary original criminal jurisdiction of this Court, but that was only in accordance with the practice of the Court in the matter of applications under Section 491 (see In the matter of Shoibalini Dassee (1898) 2 C. W. N. CCCXXXIII., and it could not make the order in question an order in a criminal trial.

36. The case of Ex parte Alice Woodhall (1888) L. R. 20 Q. B. D. 832., relied upon by the learned Advocate-General, is distinguishable from the present case for this, amongst other reasons, namely, that the language of the law (Judicature Act of 1873, Section 47), with reference to which that case was decided, is very much wider than the exceptive words of Clause 15, the words there used being 'criminal cause or matter' and not 'criminal trial.'

37. It was argued by the learned Advocate-General that, having regard to the arrangement of the clauses of the Letters Patent and to the position of the 15th clause, the provision in that clause allowing an appeal should be held limited to civil cases; and the order in question not being one made in a civil case in any sense, it is not appealable under Clause 15, even if it does not come within the exception to it. There seems at first sight to be some force in this argument; but on close examination, I do not think it is sound. If the intention of the clause had been to limit its operation to civil cases, nothing would have been easier than to say so. The use of the negative words 'not being a sentence or order passed or made in a criminal trial' may be fairly taken to imply that, but for those words, orders of that class, notwithstanding the position of the clause, would have been included in the term 'judgment' used in it.

38. Taking the language of Clause 15 of the Letters Patent in its natural sense, and as restricted only by the exceptive words used in the clause, I would answer the first question stated above in the affirmative.

39. Upon the second question the argument on behalf of the petitioner is shortly this: that the learned Judges who heard the case under Section 307 of the

Criminal Procedure Code, haying heard it before the original trial was concluded, must be taken to have heard it as an original criminal case, and to have exercised the original criminal jurisdiction of this Court; and for that reason, as well as by reason of this Court being held in the town of Calcutta, their power of sending the petitioner to jail was limited by the limits of the Presidency Town; and as the petitioner was sent to the Alipore Jail, which is beyond those limits, he was committed to illegal custody, and his subsequent transfer under order of Government to the Presidency Jail did not make the custody legal. And it is further argued, that, even if the learned Judges, when hearing the case under Section 307, exercised a jurisdiction wider than, or different, from, the ordinary original criminal jurisdiction of this Court, when the petitioner, upon sentence of imprisonment being passed, surrendered himself before this Court, he became a prisoner in the Presidency Town of Calcutta, and could, under Section 9 of the Prisoners Act III of 1900, be committed only to the Presidency Jail.

40. I am of opinion that this argument is altogether unsound. The jurisdiction which this Court exercises in hearing a case submitted to it under Section 307 of the Criminal Procedure Code, h not original jurisdiction in any sense, the hearing not having any of the essentials of an original trial.

41. The accused is not brought before this Court, nor are any witnesses examined before it. It hears the case as a Court of Reference, in the exercise of the jurisdiction vested in it by Clause 28 of its Charter, which is, by the terms of that clause, co-extensive with its Appellate Jurisdiction. It is authorised by Section 307 of the Code of Criminal Procedure to exercise all the powers of an Appellate Court and to pass such sentence on the accused as the Court which submitted the case might have passed; and being the Court which has to pass the sentence, it is required by Section 383 of the Code to forward the accused, when sentenced to imprisonment, with its warrant to the jail in which he is to be confined. Those being the provisions of the law on the subject, the learned Judges who heard this case under Section 307 of the Code had ample power to send the petitioner to the Alipore Jail, which is within the limits of the jurisdiction they were exercising, if the Alipore Jail was a place appointed by the Local Government under Section 541 as a place for the custody of persons of the class to which the petitioner belongs, and

the Superintendent of the Alipore Jail was, by Section 15 of the Prisoners Act, III of 1900, required and authorised to detain the petitioner in his custody, subject to his transfer under Section 29 of that Act to any other jail by order of the Local Government, by which he was subsequently transferred to the Presidency Jail. As for the argument that the petitioner on his surrender to this Court after the passing of sentence became a prisoner within the Presidency Town of Calcutta, and could only be sent to the Presidency Jail under Section 9 of the Prisoners Act, I think it enough to say that the petitioner, who was originally tried in a Court outside the Presidency Town, cannot be regarded as a prisoner in a Presidency Town within the meaning of Part III of the Prisoners Act, that Part applying only to persons who are originally tried by, or against whom proceedings are originally taken, before, a Court in a Presidency Town, that is, a Court within the limits of the ordinary original civil jurisdiction of one of the High Courts of Judicature at Fort William, Madras or Bombay (Act X of 1897, Section 4, Clause 41), nor can Section 9 of the Prisoners Act apply to a case like this, that section when read with the other sections of Part III clearly showing that it has no application to a case in-which a person is sent to jail in execution of a sentence of imprisonment passed in a criminal trial.

42. I would therefore answer the second question stated above also in the affirmative.

43. It remains now to consider the third question stated above. That question arises on the assumption that the Alipore Jail has not been appointed by the Local Government as a place for the custody of European British subjects, an assumption based on the statement contained in paragraph 5 of the petitioner's affidavit. The learned Advocate-General has, however, shown from the Jail Rules of 1896 that that statement is incorrect, and that the Alipore Jail is one of the places appointed for the custody of European British subjects. That being so, it becomes unnecessary to consider the question whether the learned Judges who sent the petitioner to the Alipore Jail, which was within their territorial jurisdiction, nevertheless acted without jurisdiction by reason of that jail not having been appointed by the Local Government for the custody of European British subjects, or whether they acted only with irregularity which was to be rectified not by an application under Sections 491 and 456 of the Code of Criminal Procedure, but by

a transfer of the petitioner to a proper jail by order of Government under Section 29 of the Prisoners Act. If it had been necessary to decide this question, I should have been inclined to decide it against the appellant.

44. I am therefore of opinion that the petitioner was not in illegal custody, and that this Rule should be discharged.

**Hill, J.**

45. I have had the advantage of reading and considering the judgment just delivered by my Lord, and I entirely agree with it. I only wish to say that at the hearing I entertained some doubt as to whether an order affecting the execution of the sentence of a Criminal Court might not be an order made in the trial in the sense of Section 15 of the Charter. That doubt has, however, now been removed.

**Brett, J.**

46. I agree with my Lord the Chief Justice that the Rule must be discharged.

47. I have only to add that I have had an opportunity before its delivery of reading and carefully considering the judgment of the learned Chief Justice, and that I entirely agree with his conclusions on the points dealt with and the reasons given for them.