In Re: Rudolf Stallmann

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Judge : Woodroffe,; Mookerjee and; Chitty, JJ.

Appellant : In Re: Rudolf Stallmann

Judgement :

Woodroffe, J.

1. The petitioner, one Rudolf Stallmann alias Koenig, has been extradited to Germany on a single warrant dated 1st August in respect of two alleged offences of cheating or obtaining money by false pretences. In the first case he is said to have cheated one Von Dippe, and in the second one Rudolph Kiepert. At the conclusion of the extradition proceedings lie submitted a written statement under Section 3(6) of the Indian Extradition (Act XV of 1903). The Government however refused to refer the points of law raised by him to the High Court. Being In custody under the extradition warrant in Calcutta, he accordingly applied for an order in the nature of a writ of habeas corpus to test the legality of such custody and of the warrant which was said to justify it.

2. The Advocate-Genera I has objected that we have no jurisdiction to interfere. Section 491 of the Criminal Procedure Code, however, enacts that the Presidency High Courts may, amongst other things, direct that a person illegally or improperly

detained in public or private custody within the limits of their Ordinary Original Civil Jurisdiction be set at liberty. It is not necessary to consider the wider questions which have been raised as to whether the writ of habeas corpus has or has not been altogether abolished, and as to the remedy or remedies, if any, available to persons in custody outside such limits. In this case the petitioner is within the local limits, and the section applies, unless those who say it does not establish their allegation. The Advocate-General has contended that it does not, at any rate in the present case. I add this qualification as he did not make the point clear. At one stage of his argument he appeared to submit that the mere production of a paper purporting to be a warrant by the Government was sufficient, and that any enquiry into its validity was barred even though every step leading up to the warrant might be challenged as illegal and without jurisdiction. At another time he appeared to allow that there were cases where the Code might apply. If this were so, the question would be merely whether the present was such a case. I will, however, assume for the purpose of this judgment that the contention is that the Code is not applicable at all where the custody is sought to be justified by proceedings purporting to have been held under the Extradition Act. If the argument were sound, the result would be that an aggrieved party would be without remedy, except (as the Advocate-General suggests) by argument before the Magistrate whose jurisdiction, and the legality of whose proceedings he (ex hypothesi) impugns, or by an appeal to the Government whose warrant he, challenges. Under the Extradition Act, moreover the Government is not bound to refer the case to the High Court. And if it refuses, as here, the aggrieved party is (it is said) without remedy. It must, however, be shown clearly that a supreme right, such as that to habeas corpus, or to directions in the nature of that writ, has been expressly (if that be possible to the Legislature) taken away. There is no such express provision. On the contrary Clause (3) of Section 491, whether validly or in validly, excepts certain regulations and Acts from the operation of the section. The Indian Extradition Act is not mentioned as being within the exception. It is not easy to think of a stronger circumstance against the contention of the Crown. We must assume that, if the Legislature had intended to withdraw the matter from our cognizance, it would have said so, but it has not. We are asked to infer that such was its intention, because, though in parts the procedure under the English and

Indian Acts are the same, in others they differ; and because the Indian Act does not (as does the English Act) expressly refer to habeas corpus. But the English Act did not give the right to habeas corpus. It merely declared a right which existed independently of the Statute : In re Siletti (1902) 87 L.T. 332, 334 : 71 L.J.K.B. 935, Ex parte Besset (1844) 6 Q.B. 481, and indicated in Section 11 (33 and 34 Vict., c. 52, 1870) the time when as a matter of procedure that right should be invoked. By the order in Council of the 7th March 1904 Gazette of India, p. 463, 14th May 1904) it was under Section 18 of the English Statute declared that Chapter II of the Indian Acts should take effect as if it were part of the English Statute. That order has not the effect of incorporating the procedure of Section 11 of that Statute into this country which has a procedure of its own. The order may however be invoked to show so far as it goes that there was no intention to do away with the right to habeas corpus which was declared in a statute in respect of which the Indian Act was ordered to take effect as if it were part of it. It is true that the Indian Government is vested with powers relating to extradition, but the fallacy of the argument addressed to us consists in this, that it is assumed that because the Government has such powers in extradition proceedings, our own in a different jurisdiction are done away with. This Court, it is true, cannot do that which the Legislature, by the Extradition Act, has said shall be done by the executive. We cannot, except as allowed by the Act, interfere directly with the extradition proceedings themselves. It is however clearly erroneous to therefore assume that the Court cannot act in its own jurisdiction, because the subject in respect of which such jurisdiction is invoked happens to be connected with an extradition proceeding. The matter stands in this way. We are not here directly concerned with the extradition proceedings. A person however appears before us who says that he is illegally detained. To that the Crown answer by production of the warrant for his custody. In order, however, to determine whether the custody under such warrant is legal, we must necessarily enquire into the question whether the warrant was itself validly issued. The Government can only issue a warrant by virtue of the provisions of the Legislature authorizing it. And if those provisions have not been carried out, the warrant and the custody thereunder may be found to be illegal. We can then interfere notwithstanding that the warrant has been given in extradition proceedings with which, except as otherwise expressly

provided, we are not directly concerned. This decision is not at variance with that given in this matter: Rudolf Stallmann v. Emperor (1911) I.L.R. 38 Calc. 547 : 15 C.W.N. 737. It was there held, as above stated, that the proceedings under the Extradition Act are not subject to the superintendence of the Court. There was no question of habeas corpus before the Court then. The latter, however, incidentally observed that the special procedure under Section 3(6) of the Indian Extradition Act took the place of that indicated in Section 491 of the Criminal Procedure Code. I should, however, prefer to say that the special procedure under Section 3(6) takes the place of that indicated in the English Act as the procedure to be followed in the extradition proceeding itself, and Section 3(6) is not a substitute for and does not interfere with proceedings such as these taken under a different jurisdiction to test a custody alleged to be illegal within the terms of Section 491 of the Criminal Procedure Code. The provisions of Section 491 of the Criminal Procedure Code are as much binding as those of the Extradition Act, and I hold that under the former we have power to enquire into the validity of the warrant under which the petitioner is kept in custody.

3. For the petitioner it is objected that there is no evidence of the alleged offences because the Magistrate improperly admitted the records of the Berlin Court. It is argued that they were, not duly authenticated and certified as required by Sections 78 and 86 of the Indian Evidence Act. This contention fails, because the records have in fact been authenticated in the manner prescribed by Sections 14 and 15 of the English Act which are applicable in this country. The Evidence Act does not contain the whole law of evidence governing this country. Section 2 of the Act saves rules of evidence contained in any Statute, Act, or Regulation in force in any part of British India.

4. The law of evidence is contained in the Evidence Act and in other Acts and Statutes which make specific provision on matters of evidence. One of such Statutes is the English Extradition Act which, as applicable to this country, is as much part of the lex fori as the Evidence Act itself. I hold that this objection fails.

5. Looking then at the depositions so admitted, it is contended that they do not disclose a prima facie case in support of the requisition. On an application of this

kind the applicant cannot say that there is evidence, but that this Court should determine whether the Magistrate has decided the question properly on such evidence: In re Siletti (1902) 87 L.T. 332, 334 : 71 L.R.K.B. 935. This Court is not sitting in appeal to review and weigh the evidence. It is sufficient that there should be some evidence of the offence upon which the Magistrate may reasonably act. As regards Riepert's case, however, I am of opinion that it cannot be said that there is any evidence of an offence. All that is shown is that a third party introduced the applicant to Kiepert--as Baron Von Koenig--and that the latter won of Kiepert in two games of cards a large sum. This is obviously insufficient. Even assuming to be correct the statement of Von Manteuffel, a German Police official, that the applicant is a well known card-sharper, there must be some evidence that he cheated at cards on the particular occasion alleged. I hold, therefore, that as regards Kiepert's case, there is no evidence of the offence charged, and that the warrant, so far as it is based on the proceedings taken as regards this charge, is invalid. It becomes un' necessary therefore to consider the other legal points raised in Kiepert's case.

6. I pass now to Von Dippe's case. I am quite unable to hold, as. we have been invited to do, that a prima facie case has not here been made out. On the contrary, I am clearly of opinion that a prima facie case is shown on the evidence as it stands.

7. I have come to this conclusion independently of the evidence of the Police official, Von Manteuffel, though I must not be understood to hold that witness' evidence was, as has been contended, inadmissible. Where evidence is taken in this country, the evidence receivable 'must be governed by the rules of procedure here in force. It has, however, been argued that where evidence has been received from abroad, its admissibility depends on the law under which it has been taken, and that though the English cases do not deal specifically with hearsay evidence, yet the language of the judgments is sufficiently comprehensive to warrant the statement that evidence taken abroad, whatever be its nature, and however it may have been taken, must be admitted: and that such a rule is necessary to give effect to the Treaty obligations, though the weight to be attached to the evidence is naturally a matter for the consideration of the investigating

Court: see Piggott on Extradition, 153 f 154, 97, 98 and cases there cited. The matter is one which may on a future occasion require consideration, but though disposed to assent to the argument of the Advocate-General, I desire to reserve a final decision on the point, as such a decision is not necessary for this judgment.

8. It was also objected that the enquiry could not legally proceed in the absence of the original bill, which the applicant is alleged to have obtained by cheating, and that the copy filed was inadmissible in evidence. The original was shown to the witnesses, Von Dippe and Witkopf, at the enquiry in the German Court, where it now is. A copy has been sent out with the depositions. I have held that the records of the German Court are admissible. The copy of the bill is evidence as part of that record. At first sight this matter appears to be one which involves a decision on the point which 1 have just reserved. But a closer analysis reveals a difference between the two cases. In the case of hearsay the evidence as originally taken is opposed to English Law, whereas in the present matter the evidence was originally taken in conformity with English rules, tile original having been produced when the witnesses spoke to it. Apart from any rule of evidence proper, there may be cases where the production of the original may be necessary for the purpose of the enquiry in this country, as when it is required in order the witnesses called at the enquiry may speak to it. It is unnecessary to discuss this question as it does not arise before us.

9. I now pass to a consideration of the other points taken in Von Dippe's case necessitated by the last finding.

10. It is, firstly, said that the warrants of arrest of the 24th April 1911 and 8th May 1911 were bad. Apparently under Section 4(f) of the Indian Extradition Act, 1903, the fugitive must be within the local limits of the Magistrate's jurisdiction before he can issue his warrant. On the 24th April the petitioner appears to have been outside the jurisdiction, that is on the date of the issue of the warrant.

11. It has been contended that under Section 54(7) of the Criminal Procedure Code, a Police officer may arrest without warrant. But even assuming for the sake of argument that he could not, and that the warrant was not a good one, any irregularity in the original, arrest is immaterial, provided that the subsequent

proceedings have been right: R. v. Weil (1882) 9 Q.B.D. 701 : 15 Cox. C.C. 189 where the fugitive was arrested without a warrant, and even without any requisition from the Foreign State.

12. The substantial question is not how the accused was brought before the Court, but whether the Court which enquired into his case had jurisdiction to do so. I hold that this objection fails.

13. Secondly, it is said that the warrant of arrest of the 8th May issued under Section 3 of the Extradition Act was issued without jurisdiction. If it was, the same ruling applies. But the Magistrate had in fact jurisdiction for reasons which I will state in connection with the next objection.

14. Thirdly, it is argued that the Magistrate who made the enquiry and arrest under Section 3 was without jurisdiction, as that section does not, it is contended, empower the Government to order a Magistrate to enquire and arrest where the fugitive is a person not within the local limits of his jurisdiction. In the present case the petitioner was at, and was arrested at, Calcutta by the Magistrate of Alipore who was ordered to make the enquiry. I think, however, that this is an erroneous reading of that section. The Government may issue its order to any Magistrate, provided that he is one who has jurisdiction to enquire into the crime of the nature of that for which extradition is sought. It is a provision in favour of the fugitive ensuring to him a right to such competency and efficiency in the Magistrate as a subject would have in the case of a crime committed in this country. If, therefore, by way of example, the offence for which extradition were sought was murder, any Magistrate in India could be ordered to enquire into the matter, who had jurisdiction to try such an offence if committed in this country. The words in Section 3(1) it if it had been an offence committed within the local limits of his jurisdiction,' which have been relied on, are not in conflict with this conclusion. They are necessary, because no Magistrate is empowered to try offences committed in this country without reference to the locality where the offence was committed. This objection fails, though I desire to express the opinion that it would have been better if the Chief Presidency Magistrate had been directed to enquire. In that case there could have been no opportunity for the contention which has been raised

before us that Alipore was selected as the venue to oust this Court's jurisdiction under Section 491 of the code. It is also advisable that one particular Magistrate may, as in England, be directed to enquire into these matters, so that there may be an opportunity of gaining experience therein.

15. Fourthly, it is argued that the enquiry of the Magistrate under Section 3 was without jurisdiction on the following grounds: As the requisition was made to the Government of India, it was necessary that the latter Government should issue the order under Section 3. The order to enquire dated the 8th May 1911 was signed by Mr. Chapman, the Judicial Secretary to the Government of Bengal. A doubt having arisen as to whether this order of the 8th May was an order of the Government of India, a further order was issued on the 10th May by the Secretary to the Government of India. It is objected that the first order was bad, as it was given (as alleged) by the Government of Bengal, and that the second order was also bad, because it is not one under Section 3(f), but merely purports to ratify and confirm a previous invalid order, which cannot be done. The argument would have been avoided, if the Government of India had, as I think it should have done, issued its order direct in the first instance. As matters stand, we have to determine whether the first order was that of the Government of India or Bengal, and, secondary if it was by the latter Government, whether the second order has a force independent of the ratification which it purports to effect. It is clear that if the first order was by the Government of Bengal, it was invalid and could not be ratified by the subsequent order. There is, however, evidence that Mr. Chapman in making the first order was acting under instructions from the Government of India, and the order of the 10th May states that fact. No doubt the order purports to ratify and confirm the earlier one, and it may be said that if the previous act was that of the Government of India, there was no need for ratification, whilst if it was by the Government of Bengal, it could not as an invalid order be ratified at all. It is, however, replied that these words are used in an evidentiary way only, and are only another form of stating that it was the Government of India which had issued the previous order. Assuming that that was so, another objection arises. It is admitted that the Government of India did not appoint the Magistrate personally, but left it to the selection of the Government of Bengal which then acting for the Government of India appointed the Magistrate. It may be a question whether the

Government can delegate its powers, and whether this did not amount to a delegation. But even assuming for argument, though not deciding in favour of the applicant, that the first order was a bad one on any or all of the grounds stated, and that it could not be confirmed, we rind at the conclusion of the order of the 10th May the words 'and direct you in pursuance thereof and of the statutory provisions in that behalf to enquire into the said case.' The words 'in pursuance thereof' which refer to the previous order do not here assist. But if, as is contended for the Crown, the subsequent words imply a present order to enquire independent of what had been previously done, then all the objections of the petitioner are met. It is quite clear that the Government on the 10th May intended to give the order, and I think the reasonable meaning of the document then given is 'We gave you an order on the 8th through the Government of Bengal, but as a question has arisen as to the Government by which it was given, we state that it was given by ourselves, but, in any event and to cure all defects, we now direct you to proceed.' I am of opinion, therefore, that the Government did give valid effect to its intention, and that the Magistrate had jurisdiction to enquire.

16. Fifthly, it is contended that the District Magistrate could not transfer the proceedings before Mr. Haldar to his own file. The 'case' which was then transferred was not the matter which was later the subject of enquiry under Section 3, but the application of Stallman for the return of his property, Such a transfer was permissible under Section 528 of the Criminal Procedure Code.

17. Sixthly, it is argued that the Magistrate could not initiate fresh proceedings on the 20th May whilst proceedings under the order of the 8th May were pending. Assuming for the sake of argument that the order of the 8th May was not a good order, then it is obvious that there were no proceedings validly pending. But if there were, there appears to be no substance in the objection. There is no reason shown why fresh proceedings could not be taken, nor why if one proceeding is abandoned another should not be started.

18. I now come to the matters in respect of which the petitioner alleges that he has been prejudiced. He firstly complains of the vagueness of the charges made against him, which did not (he says) furnish particulars reasonably sufficient to

give him notice of the offence with which he was charged, and their alteration from time to time; and, nextly, he complains that he has been prejudiced by the action of the District Magistrate in hurrying through his enquiry and refusing to grant him any time for the production of evidence in defence.

19. I will deal with the second of these matters first, as a decision on this point renders unnecessary a decision of the first.

20. The facts are shortly these. On the 26th April the arrest was effected and on the 2nd May the extradition papers arrived. On the 20th May the enquiry was held and on the 24th it was concluded. On that day the applicant put in a petition asking for a fortnight's adjournment, to consider his position, and stating that documents which he had sent for on the 27th April and which he might desire to put in evidence, had not arrived. The Crown unfortunately, I think, objected to the adjournment. It, however, requested that the accused might be called on to state what the nature of his defence and evidence was, the contention being that the application was neither useful nor bona fide. The Advocate-General further contended that the allegation that extradition had been sought for the 'political reasons' alleged by the applicant was even if it was established, irrelevant and that this was a matter for the Magistrate to determine. The opposite party objected to the Advocate-General's suggestion and refused to make any statement. The Court did not on that enquire into or determine upon these matters, but passed an order in the following terms:

The Counsel for the accused applies for an adjournment on the ground that telegrams have been sent to England for certain evidence, and this evidence cannot be expected before the mail after next. This enquiry is being conducted as nearly as possible in the manner laid down in Chapter XVIII of the Criminal Procedure Code. Section 208, Criminal Procedure Code, requires me to take all the evidence that may be produced in support of the accused. But I am not bound to adjourn the hearing on the ground that evidence may be forthcoming on the next date fixed. If evidence is forthcoming, I can subsequently record it under Section 212 of the Criminal Procedure Code. I therefore decline to adjourn the case.

21. As regards the last portion of the order, I may first observe that the Magistrate by sending up his report to Government on the 29th May became functus officio and rendered himself incapable of doing that which he said he would do if evidence were subsequently produced.

22. This order, it will be seen, does not proceed on the ground that the evidence sought was useless or that the application was made only with the object of delay. The ground upon which it proceeds, though not expressly stated, appears to be that urged before us on behalf of the Crown on this application. Here it has been contended that the only obligation on a Magistrate under Section 3(3) of the Indian Extradition Act is to take such evidence as may be produced by the fugitive criminal, provided that such evidence is presently available and tendered at the close of the?;, evidence given in support of the requisition. There is, it is said, no obligation to grant an adjournment under any circumstances whatever, the matter being merely one of grace. I cannot assent to this proposition. The Legislature intended that the fugitive criminal should be given an opportunity of defence. It cannot have been intended that he should be called upon to do that which might be physically impossible. In the present case, if the accused has a defence it could not reasonably be expected, under the circumstances of this case, that he should have produced it before the 24th May, three weeks only having elapsed from the date of the arrival of the extradition papers and the close of the enquiry in the case. In the other case the interval was still shorter, less than ten days having elapsed between the arrest and the conclusion of the enquiry, when on a petition for adjournment stating that the applicant wished to show that he had not cheated, the Magistrate without assigning any reason passed the order--'objection disallowed and time refused.' Doubtless, as the Advocate-General has represented, expedition is desirable, but this must not be sought at the cost of depriving the accused of any opportunity to present his defence. It may be that, as the Advocate-General argues, he has none, and that the applications were made for the purpose of delay. If the Magistrate had reason to suspect this, it was open to him to question the applicant. The latter might have, if he liked, stood on his right not to answer. But if he did so, the Court might have drawn such inferences as the refusal to reply and the circumstances of the case suggested. It did not do so, and. we cannot speculate as to the existence of reasons for the Magistrate's

order beyond those which appear on the order sheet; nor are we ourselves in a position to say on the materials before us that the application for adjournment was in fact for purposes of delay, when no steps were taken to enquire into the point; nor are we called upon in the absence of materials to speculate as to whether there is or can be any defence. I must hold that the applicant was not given an opportunity of defence which the Act provides for him.

23. The next question is as to the effect of this. If the matter were one of irregularity only, probably it would not be a ground for interference. But in the circumstances of the present case it went I think to the jurisdiction of the Magistrate. The Government may issue a warrant upon receipt of the Magistrate's report and written statement, if any. That report can only be made after an enquiry held in conformity with the provisions of the Act. The Act requires that during such enquiry evidence which may be produced on behalf of the fugitive criminal shall be received. This, as I have held, involves that a reasonable opportunity should be given in the judicial discretion of the Magistrate. In the present case the Magistrate refused such an opportunity for reasons which I hold are untenable. The result, therefore, is that the enquiry was not according to law and the issue of the warrant upon such an enquiry was itself invalid. This conclusion is to be regretted, for, if instead of an undue haste, which defeats itself, an opportunity for defence had been given, that defence would either have been substantiated, or it would have failed, and in either case the waste of time involved in the proceedings would have been evaded, I must, therefore, hold that the extradition warrant is invalid as regards Kiepert's case, because there is no evidence of an offence; and as regards Von Dippe's case, because, though there is evidence of an offence, the applicant was given no opportunity of defence. I hold that the applicant has been illegally detained thereunder and direct that he be set at liberty.

24. We have been asked to pass orders with respect to his property detained by Government, but this is not a matter with which we can deal in these proceedings which are solely concerned with the liberty of the person of the applicant.

Mookeejee J.

25. The rule now under consideration has been granted upon the application of one Rudolf Stallmann against whom a warrant for surrender has been issued by the Government of India under subSection 8 of Section 3 of the Indian Extradition Act, 1903. His contention is that his detention is illegal, as the provisions of the Indian Extradition Act have not been strictly followed, and that he is consequently entitled to be set at liberty. In answer to the rule, it has been argued on behalf of the Crown that this Court has no jurisdiction to give any directions in the matter, and that the production of the warrant issued by the Government of India is conclusive proof that the petitioner is now in lawful custody. The question of jurisdiction thus raised is of fundamental importance and requires careful examination at the outset.

26. On behalf of the petitioner, it has been argued in the alternative, first that this Court is en tit Jed to issue a writ of habeas corpus and to determine thereon the legality of the detention of the petitioner; and, secondly, that the Court is entitled, under Clause (6) of Sub-section (2) of Section 491 of the Criminal Procedure Code, 1898, to give directions in the nature of habeas corpus, and for that purpose to determine whether the petitioner is now in legal custody. On behalf of the Crown, the learned Advocate-General has suggested that it is 5 not competent to this Court to issue a writ of habeas corpus, and that the provisions of Section 491 of the Criminal Procedure Code are so manifestly inconsistent with those of the Indian Extradition Act, that they can have no application when a warrant has been issued by the Government of India under Section 3(8) of the Indian Extradition Act. It is not necessary for our present purpose to consider whether a writ of habeas corpus can be issued by this Court, or whether the powers of the Court in this matter can be taken away by the Indian Legislature. If the question arose for consideration, we should have to examine the principles recognised in the cases of In the matter of Ameer Khan (1870) 6 B.L.R. 392 : 6 B.L.R. 459 (App.), Queen v. Amir Khan (1871) 9 B.L.R. 36 In re Maharanee of Lahore (1848) Taylor 428, and Surendranath Banerjee v. Chief justice and Judges of the High Court of Bengal (1883) I.L.R. 10 Calc. 109 : L.R. 10 I.A. 171. It is sufficient for our present purpose to hold that Section 491 of the Criminal Procedure Code is applicable to this matter. It is not disputed that Section 491, by the very generality of its language, is applicable to cases under the Indian Extradition Act. It entitles this

Court, whenever it thinks fit, to direct that a preson illegally or improperly detained in public or private custody within the limits of its Ordinary Original Civil Jurisdiction be set at liberty. The only restriction imposed upon the exercise of this power is that embodied in Sub-section (3), which lays down that nothing in the section applies to persons detained under the Bengal State Prisoners Regulation, 1818, and four other Regulations and Acts relating to State prisoners. This materially strengthens the position that Section 491 was not intended to be excluded in its application when a warrant has been issued under Section 3(8) of the Indian Extradition Act. The burden, therefore, lies very heavily upon those who, in the words of Sir Joseph Napier in Levinger v. Reg. (1870) L.R. 3 P.C. 282, 289 assert that a right of so much importance to the criminal, given by the Common Law, has been taken away by implication, unless such implication is absolutely necessary for the interpretation of the Statute. The learned Advocate-General has undertaken to discharge that burden by an examination of the provisions of Section 3 of the Indian Extradition Act, and a comparison thereof with the provisions of Section 3 and Section 11 of the English Extradition Act, 1870. In my opinion, the attempt has wholly failed. It has not been disputed that Section 3 and Section 11 of the English Statute recognise the right of a fugitive criminal to have a writ of habeas corpus issued to test the legality of his detention. It has not been disputed also that the right is not created by the Statute, but exists under the Common Law: Crowley's Case (1818) 2 Swans. 1, 48, Ex parte Besset (1844) 6 Q.B. 481, and In re Siletti (1902) 87 L.T. 332, 334 : 71 L.J.K.B. 935. The learned Advocate-General, however, has contented that although the order in Council made on the 7th March, 1904, makes the second chapter of the Indian Extradition Act take effect as if it were part of the English Statute, and although Section 6 of the Indian Extradition Act attributes special meanings to the expressions ' Police Magistrate' and 'Secretary of State' in Section 3 of the English Extradition Act, yet the effect is not to make the writ of habeas corpus applicable to cases of proceedings under the Extradition Act in this country, because a special procedure is prescribed by the Indian Extradition Act, radically inconsistent with the issue of a writ of habeas corpus or of directions of the nature of a habeas corpus under Section 491 of the Criminal Procedure Code. The Advocate-General has minutely examined and contrasted the procedure on a requisition of surrender under the Indian Act and

the English Statute respectively, and he has drawn special attention to divergences upon two important points, namely, first, that whereas under the English Statute a fugitive criminal may be discharged by the Police Magistrate for want of evidence, under the Indian Act the matter rests exclusively with the Government, and, secondly, that whereas the English Statute expressly recognises the applicability of a writ of habeas corpus to proceedings for extradition, the Indian Act not only makes no mention of any similar provision but allows a reference to the High Court at the discretion of the Government where the written statement of the person sought to be extradited or the report of the Magistrate raises an important question of law. The Advocate-General has invited us to hold that the reference to the High Court was intended by the Legislature to take the place of an application for a writ of habeas corpus by the alleged fugitive criminal under the English law. I am unable, after anxious consideration of the matter, to accept the contention as well founded. In my opinion, the reference to the High Court can in no sense be treated as a substitute for the writ of habeas corpus. The aggrieved party can have recourse to the latter remedy at his choice, whereas the former is entirely at the discretion of the Government. The Advocate-General strenuously contended that the sole remedy of the alleged fugitive Criminal is a representation of his case to the Magistrate whose jurisdiction, perhaps, he is driven to question, followed by a representation to the Government, the legality of whose proceedings he challenges. Sub-section (7) of Section 3 of the Indian Extradition Act is, in my opinion, intended to serve an' entirely different purpose; it enables the Government to secure the assistance of the High Court, should an important' question of law arise upon the report of the Magistrate or the written statement of the fugitive criminal, but it does not take away from the criminal the benefit of the provisions of Section 491 of the Criminal Procedure Code. I am not unmindful of the observations. of this Court in Rudolf Stallmann v. Emperor (1911) I.L.R. 38 Calc. 547 which may seem to mitigate against the view I take; the question which now arises, however, did not arise at that stage, and the view may well be maintained that although it is not open to this Court to interfere with the proceedings before the Magistrate during the pendency of the enquiry, occasion may arise for the exercise of our powers under Section 491 of the Criminal Procedure Code, after the enquiry has closed. It has been argued,

however, by the learned Advocate-General that as in the case before us a warrant has already been issued by the Government of India under Sub-section (8) of Section 3 of the Indian Extradition Act, the authority of this Court, assuming it to have existed at any stage, to issue a writ of habeas corpus or to give a direction of the nature of a habeas corpus has finally and completely terminated. The Advocate-General has contended in substance that as international extradition is the surrender by one nation to another, for trial or punishment, of a person accused or convicted of an offence within the jurisdiction of the latter, as soon as a warrant for surrender has been issued, it becomes an act of Government performed by the executive authority, the legality of which cannot be questioned in a Municipal Court. I am wholly unable to accept this position as well founded. The Government of India, when it issues a warrant for surrender under Sub-section (8) of Section 3 of the Indian Extradition Act, does so in exercise of a statutory authority. Such power can be exercised validly, only after strict compliance with the necessary preliminary provisions formulated by the Legislature in this very Act. Consequently, if the provisions of the Act have been contravened, the action of the Government may be successfully challenged, even though the warrant for surrender has been already issued. A similar question has been raised on more than one occasion in the Courts of the United States, and it has been uniformly ruled that the legality of the detention of a fugitive criminal may be examined on habeas corpus after the issue of a warrant for his surrender by the President as the head of the Executive : Ex parte Kaine (1853) 3 Blatchford 1 : 14 Fed. Cas. 7597, In re Macdonnell (1873) 11 Blatchford 170 : 16 Fed. Cas. 8772, In re Sheazle (1845) 1 W. & M. 66 : 21 Fed. Cas. 12734, In re Herres (1887) 33 Fed. Rep. 165: see also the observations of Lord Watson in Sprigg v. Sigcau [1897] A.C. 238 which cannot be taken to have been affected by the decision of the Court of Appeal in Rex v. Crewe (Earl) [1810] 2 K.B. 576. To put the matter briefly, although the surrender of the fugitive criminal is an executive function, the mere issue of the warrant of surrender does not deprive the Court of its jurisdiction to examine on habeas corpus the legality of the detention and to determine the propriety of the statutory acts upon the performance of which the validity of the warrant depends. I am, therefore, of opinion that this Court has jurisdiction under Section 491 of the Criminal Procedure Code to give a direction of the nature of

habeas corpus and to examine whether the person detained in public custody under the Indian Extradition Act is legally detained; and I further hold that our jurisdiction in this matter has not been taken away, merely because the Government of India have already issued a warrant for surrender under, Sub-section (8) of Section 3 of the Indian Extradition Act, 1903.

27. The next question, which calls for decision, relates to the manner and extent of the exercise of our jurisdiction. It is well settled in England that the Court -hearing the application for a writ of habeas corpus is not a Court of appeal from the Magistrate on questions of fact; but has only to see that he had such evidence before him as gave him authority and jurisdiction to commit. The Court will not review the decision of the Magistrate, if there was any evidence before him to justify commitment; the sufficiency of such evidence is a question entirely for the Magistrate: In re Arton [1896] 1 Q.B. 509, Ex parte Huguet (1873) 29 L.T. 41, In re Counhaye (1873) L.R. 8 Q.B. 410, R. v. Maurer (1883) 10 Q.B.D. 513 In re Meunier [1894] 2 Q.B. 415, In re Siletti (1902) 87 L.T. 332 : 71 L.J.K.B. 935; but when there was no evidence before the Magistrate, the Court will interfere : R. v. Maurer (1883) 10 Q.B.D. 513. The question has been much debated in the Courts of the United States, and although there are isolated decisions to the contrary (Moore on Extradition, Vol. I, Sections 354-55), the rule is now firmly settled that a writ of habeas corpus cannot perform the office of a writ of error; if the committing Magistrate in extradition proceedings has jurisdiction of the subject matter and of the accused, if the offence charged is within the terms of the Treaty, and if farther the Magistrate has before him competent legal evidence on which to exercise his judgment, such decision cannot be reviewed on habeas corpus: Terlinden v. Ames (1902) 184 U.S. 270, Pettibone v. Nichols (1906) 203 U.S. 192 Bryant v. United States (1898) 167 U.S. 104, Ornelas v. Reyz (1895) 161 U.S. 502, Oteiaz v. Jacobus (1889) 136 U.S. 330 Benson v. MacMahon (1887) 127 U.S. 457 Moore on International Law, Vol. IV, page 394, where it is pointed out that the view adopted by the Supreme Court of the United States accords with that adopted by the Indicia Committee in United States of America v. Gaynor [1905] A.C. 128. These principles must be borne in mind when we examine the grounds upon which the legality of the extradition proceedings is challenged on behalf of the petitioner.

28. The grounds which have been assigned by the learned Counsel for the petitioner in support of his contention that the extradition proceedings were illegal and the warrant of surrender issued by the Government of India was invalidated, may be classified under three heads, namely, first, objections to the legality of the initial arrest of the petitioner and of the proceedings Under Section 4 of the Indian Extradition Act; secondly, objections to the institution of the proceedings under Section 3; and, thirdly, objections to the mode of enquiry by the Magistrate under Section 3. It will be convenient to consider the objections under the three heads just specified, though they wrere not placed before the Court in their logical or chronological sequence.

29. In so far as objections of the first class are concerned, two grounds have been pressed by the learned Counsel for the petitioners. It has been argued, in the first place, that the arrest of the petitioner on the 26th April 1911 while he was on the S.S. Caspian in the river Hooghly was illegal. It has been contended, in the second place, that the proceedings, which were instituted before Mr. Haldar, Deputy Magistrate at Alipore, were without jurisdiction, and the subsequent transfer thereof to the Court of the District Magistrate, Mr. Swan, on the 2nd May 1911, was equally without jurisdiction.

30. In so far as the first ground is concerned, I am inclined to accept the contention of the petitioner as well founded. Section 4, Sub-section (7) of the Indian Extradition Act provides that where it appears to any Magistrate of the first class or any Magistrate specially empowered by the Local Government in this behalf, that a person within the local limits of his jurisdiction is a fugitive criminal of a Foreign State, he may, if he thinks fit, issue a warrant for the arrest of such person. The plain meaning of the section is that the warrant may be issued when the person to be arrested is within the local limits of the jurisdiction of the Magistrate. It is not disputed that when Mr. Haldar issued the warrant on the 24th April 1911, the petitioner was not within the jurisdiction, and was, as a matter of fact, on board the ship in the Bay of Bengal. The issue of the warrant, therefore, was in its inception without jurisdiction. In this view, it becomes unnecessary to consider whether the part of the river Hooghly, where the petitioner was arrested on the 26th April, was within the jurisdiction of Mr. Haldar, Deputy Magistrate at Alipore, or of the Chief

Presidency Magistrate at Calcutta.

31. There is no substance in the second objection that the transfer of the proceeding initiated in the Court of Mr. Haldar to the Court of Mr. Swan was without legal authority. It is obvious that all that was pending before Mr. Haldar at the time was an application by the petitioner for return of the property which had been found on his person at the time of his arrest and had passed into the custody of the Police authorities. There can be no question, I think, that the proceeding before Mr. Haldar in this respect could be withdrawn by the District Magistrate under Section 528 of the Criminal Procedure Code. In fact, Section 4 of the Indian Extradition Act merely provides a preliminary procedure for the arrest of a fugitive criminal, and his release on bail or detention for not more than two months, pending the institution of proceedings under Section 3, Sub-section (1). When, therefore, an arrest has been effected under Section 4, the purpose of that section has been practically served, The substance of the objections of the petitioner under the first class consequently reduces to this, that his arrest was in its inception unlawful, and I shall assume that the arrest was unlawful notwithstanding the provisions of Section 54, Sub-section (7), Clause (7) of the Criminal Procedure Code, read with Section 23 of the Indian Extradition Act. The question arises, whether the illegality of the initial arrest vitiates the extradition proceedings. In my opinion, the question must be answered in the negative. It is sufficient to refer to the case of B. v. Weil (1882) 9 Q.B.D. 701 : 15 Cox. C.C. 189, where it was ruled that irregularity in the original arrest is immaterial when the subsequent proceedings for extradition have been right. The essence of the matter is that what determines the validity of the warrant for surrender under Section 3(8) is not the legality of the initial arrest, but compliance with the procedure prescribed for the initiation and conduct of the enquiry under Section 3. The jurisdiction of a competent Magistrate to hold an enquiry under Section 3, Sub-section (3), is not affected by reason of the previous illegal arrest of the fugitive criminal. Section 3, Sub-section (3), provides that when such criminal, that is, the fugitive criminal for whose surrender a requisition has been made by a Foreign State, appears or is brought before the Magistrate specially empowered by the Government to enquire into the crime, the Magistrate shall enquire into the case. The Magistrate can exercise his jurisdiction if the criminal appears or is brought before him; it is

immaterial, for the validity of the enquiry, whether he appears voluntarily or has been previously arrested without authority. An analogy in support of this view is furnished by the elementary principle that a Court, having before it a person charged with a crime whom it is competent to try, is not deprived of jurisdiction by the fact that he has been forcibly and unlawfully brought from foreign jurisdiction. This principle was affirmed in the case of Emperor v. Vinayak Savarkar (1910) 13 Bom. L.R. 296 and had been previously recognised in a variety of cases of the highest authority : Reg v. Lopez (1858) Dears. & B. 525, 538 Ex parte Scott (1829) 9 B. & C. 446, Mahon v. Justice (1887) U.S. 700 Ker v. Illinois (1886) 119 U.S. 436 and Reg. v. Walton (1905) 10 Cana. Cr. Cas. 269. I hold, therefore, that, even if it be assumed that the petitioner was illegally arrested, that circumstance did not invalidate the enquiry under Section 3, Sub-section (3) of the Indian Extradition Act; that he was in Court was sufficient to entitle the Magistrate to hold the enquiry, no matter how he had been brought before the Magistrate. The grounds included in the fist class of objections, consequently, cannot be sustained.

32. The grounds comprised in the second class, that is, 'those that relate to the institution of proceedings under Section 3, are four in number, namely, first, that proceedings under Section 3 could not be instituted before the proceedings under Section 4 had been terminated; secondly, that the District Magistrate could not be authorized to hold an enquiry under Section 3, because the petitioner, at the time the authority was conferred upon him, lived beyond the limits of his territorial jurisdiction; thirdly, that the District Magistrate could not be authorized to conduct an enquiry under Section 3, because the only Magistrate who could be authorized was the Magistrate who had taken action under Section 4: and, fourthly, that the District Magistrate could be duly authorised only by the Government of India whereas he acted under the direction of the Local Government.

33. The first branch of this contention is obviously unsubstantial. Section 4, as I have already explained, does not contemplate any enquiry; it provides, if I may use the expression, for ad interim arrest of the alleged fugitive criminal so as to render effective the proceedings under Section 3 when the}' are subsequently instituted. An arrest under Section 4 may be effected before the receipt of the requisition from the Foreign Government mentioned in Section 3; otherwise the

criminal might escape if the receipt of the requisition in the usual diplomatic way had to be awaited in every case: cf. Attorney-General v. Fedorenko (1911) 27 T.L.R. 541. The two sections do not overlap, and as soon as an arrest has been effected under Section 4, and the question of bail or detention has been determined, its operation is, for all practical purposes, exhausted. There is no conceivable reason why thereafter a proceeding under Section 3 should not be instituted.

34. In so far as the second branch of the contention is concerned, it has been argued that the District Magistrate could not be authorised to conduct an enquiry under Section 3, because at the time such authority was conferred upon him, the petitioner lived in Calcutta beyond the limits of his territorial jurisdiction. This contention, in my opinion, cannot be supported. There is a clear difference in this respect between Section 3 and Section 4. The latter section authorises that Magistrate alone to issue a warrant for the arrest of the fugitive within whose jurisdiction he may be found. The former section, on the other hand, authorises the Government to issue an order for enquiry to any Magistrate who would have had jurisdiction to enquire into the crime if it had been an offence committed within the local limits of his jurisdiction. The plain meaning of the section is that the enquiry may be entrusted to any Magistrate subject to the qualification that he would have been competent to enquire into the crime if it had been an offence committed within the limits of his territorial jurisdiction. The essence of the matter, therefore, is that it is the nature of the crime which determines the status of the Magistrate to be selected in other words the Legislature had in Section 3 in view, not the place where the fugitive criminal might be found, but the nature of the crime he is alleged to have committed, and the experience and qualification of the Magistrate who is to hold an enquiry into the matter. From this point of view, the District Magistrate was not disqualified merely because the petitioner resided beyond the limits of his jurisdiction. It is not disputed that if the alleged offence had been committed within the local limits of the jurisdiction of the District Magistrate, lie would have been competent to enquire into it; he was consequently qualified under Sub-section (1) of Section 3 to enquire into the case.

35. The third branch of the contention is, in my opinion, equally unsustainable. It is suggested that if Sections 3 and 4 are read together, the inference follows that the only Magistrate who can be directed to enquire into the crime under Section 3(1) is the Magistrate who has previously issued a warrant for; arrest under Section 4(1). There are two obvious answers to this argument, namely, first, that no such limitation, as is suggested, is justified by the language of Section 3, Sub-section (f), and, secondly, that action under Section 4, Sub-section (2), need not in every extradition case precede the institution of an enquiry under Section 3.

36. The fourth branch of the contention raises the question, whether the District Magistrate was directed to enquire into the case by the Government of India or by the Local Government. It is beyond controversy that under Section 3, Sub-section (7), the only Government competent to issue the order for enquiry is the Government to whom the Foreign State has made a requisition for the surrender of the fugitive, Criminal. In this case, the requisition had been made is the Government of India, and that Government alone was competent to issue the order for enquiry to the Magistrate. This function must be performed strictly in accordance with the statute, and cannot be delegated. In the present case, I am of opinion that whatever might have been done by the Government at the initial stage, there was an order by the Government of India on the 10th May 1911, in conformity with Section 3, Sub-section (1). No doubt, the letter of that date is not very felicitously expressed, and it is open to the legitimate comment that it speaks of ratification of a previous order apparently issued by the Local Government. But as my learned brother Woodroffe has fully explained, the letter in substance confers an authority upon the District Magistrate to enquire into the matter under Section 3, Sub-section (1). In that view, I entirely agree. Consequently, the objections comprised in the second class and relating to the institution of the proceedings under Section 3 must be overruled as untenable.

37. The grounds comprised in the third class, that is, those that relate to the enquiry under Section 3, are three in number, namely, first, that the report of the Magistrate is based upon evidence not legally admissible; secondly, that, upon the evidence, no prima facie case has been made out; and, thirdly, that even if it be assumed that the evidence established a prima facie case, there has been no

legal enquiry as contemplated by Section 3, because the petitioner was not allowed any opportunity to adduce evidence and rebut the case sought to be made against him.

38. In so far as the first branch of these contentions is concerned, we must remember at the outset that the proceedings before the Magistrate cannot be questioned if there was some legal evidence on which he might properly conclude that the accused had committed an offence within the Treaty as charged: Ornelas v. Reys (1895) 161 U.S. 502. In other words, as has been sometimes said, on a writ of habeas corpus, the main questions to be decided are whether the Magistrate had jurisdiction and whether there was sufficient legal ground for commitment of the prisoner; and the Court will decline to consider questions touching the introduction of evidence and the sufficiency off the authentication of documentary proof, unless the objection is such that, if effect was given to it, there would be no evidence left upon which the order for extradition could be supported: Benson v. MacMahon (1888) 127 U.S. 457. To put the matter briefly, mere irregularities in the proceedings before the Magistrate, which are unimportant in regard to the sufficiency of the proceedings, are not review able on habeas corpus . Stevens v. Fuller (1889) 136 U.S. 478. To the same effect is the decision in Ex Van Inthoudt Unreported, mentioned by Moore in his International Law, Vol. IV, page 396. In the case before us, we are obliged to examine the objections of the petitioner to the reception of evidence, because some of these objections, if allowed, would leave no residuum of evidence upon which the report of the Magistrate could be supported. The first reason assigned on behalf of the petitioner is that the foreign depositions and papers have not been properly authenticated in accordance with the provisions of Section 82 of the Indian Evidence Act. This objection is based on the assumption that the matter is governed by the rules laid down in the Indian Evidence Act. In support of this view, reliance has been placed upon Section 3, Sub-section (3) of the Indian Extradition Act. I am unable to hold that this contention is well founded, because it is plain that the matter is governed by Article XI of the Extradition Treaty with Germany (14th May 1872), and Section 15 of the English Extradition Act, 1870 (Order in Council, dated 10th August 1872). The provisions of the Indian Evidence Act, to which reference has been made, have no application, notwithstanding Section 2 and

Section 5 and the observation of the Judicial Committee in Rani Lekraj Kuar v. Mahpal Singh (1879) I.L.R. 5 Calc. 744 : L.R. 7 I.A. 63 they merely show that the Indian Evidence Act has repealed all rules of evidence not contained in any statute or regulation. Consequently the provisions of Section 15 of the English Extradition Act, 1870, which are applicable to extradition proceedings in this country, not with standing Section 18, govern the present matter, and it is not disputed that the depositions and papers forwarded by the German Government have' been authenticated in accordance with Section 15 of the English Extradition Act, 1870: see Piggott on Extradition, page 96, and Queen v. Ganz (1882) 9 Q.B.D. 93. The second ground assigned is that the original bill has not been forwarded, and that the copy attached to the record is not admissible. I am not prepared to accept this contention as substantial. The original of the bill was duly proved in the German Court, and it was made part of the deposition of the witness who proved it. Section 15 of the English Extradition Act, 1870, is, in my opinion, sufficiently comprehensive to render the copy of the bill admissible in evidence. But I do not wish it to be understood that the accused can in no case insist upon the production of the original; if the offence alleged is one for the investigation of which the original has to be examined, he may very well demand that the original should be produced so as to enable him to make a proper and adequate 'defence before the Magistrate. The case before us, however, is not of that description, and I cannot hold that there is any substance in the objection that the original bill has not been produced. The third ground assigned is that part of the evidence is hearsay, and is not admissible in this country. The question raised is of considerable nicety, and I reserve my opinion upon it, though I may add that, in view of Article XI of the Treaty with Germany, which provides that the authorities of the State applied to shall admit as entirely valid evidence the sworn depositions or statements of witnesses taken in the other State, it is by no means easy to support the objection of the petitioner. The question is lucidly discussed by Sir Francis Piggott in his Treatise on Extradition, page 15H, where the learned author assigns weighty reasons in support of the view that the evidence taken abroad, whatever may be its nature and however it may have been taken, must be admitted; the Court in which extradition proceedings are instituted acts only as auxiliary to the Court in which the fugitive is ultimately to be tried after his surrender, and evidence which

would be receivable there in proof of his guilt may be considered when the question of extradition is examined: Piggott, p. 100. The point, however, is immaterial for the purpose of the present case, because even if the hearsay portion of the evidence is excluded, there is sufficient residuum left upon which the Magistrate could base his report. The fourth ground, which has been somewhat faintly suggested, is that the evidence in the German Court was taken in the absence of the accused. The decision In re Counhaye (1873) L.R. 8 Q.B. 410 shows however, that depositions which have not been taken in the presence of the accused may be admitted by the Magistrate. All the four grounds assigned In support of the contention that the report of the Magistrate is based upon evidence neither duly authenticated nor legally admissible entirely fail.

39. The second branch of the contention of the petitioner is that the evidence does not disclose a prima facie case. I am not prepared to accept this contention so far as the case of Von Dippe is concerned, though it may be conceded that it is well founded in respect of the case of Kiepert. It is not necessary to review the facts in detail; it is sufficient to state first the direct evidence, as also the surrounding circular stances shew that, so far as the former is concerned, a case has been made out. We must remember in this connection, as was observed in the case of Sternaman v. Peck (1877) 80 Fed. Rep. 883 that where the committing Magistrate had before him evidence, even though it might be conflicting and far from convincing, of the commission of the offence by the person whose extradition' was demanded, the Court would not on habeas corpus review his determination on the facts; if the Court would not interfere in such a case, it would clearly also not interfere where, as here, there was no conflict or doubt about the matter.

40. The third branch of the contention of the petitioner is that he had no opportunity afforded to him to adduce evidence in support of his defence. In my opinion, this contention is obviously well founded. Section 3, Sub-section (3) of the Indian Extradition Act, makes it the duty of the Magistrate to take such evidence as may be produced in support of the requisition, and on behalf of the fugitive criminal. This involves by necessary implication the position that the Magistrate must afford reasonable opportunity to the person arrested to produce his evidence. The learned Advocate-General has contended that the Magistrate is

bound to take such evidence as the arrested person may have ready in Court, that it is not the duty of the Magistrate to adjourn the hearing to enable him to produce his evidence, and that if the Magistrate adjourns the hearing, he does so only as a matter of grace. This contention is so manifestly unreasonable that I cannot but deem it lamentable that it should have been pressed on behalf of the Crown before the Magistrate, and should have found acceptance with that officer. In my opinion, a Magistrate who conducts an enquiry under Section 3, Sub-section (3) of the Indian Extradition Act, is bound to f afford reasonable opportunity to the person arrested, produce his evidence, and if he declines to do so, he fails to conduct the enquiry in the mode prescribed by the Legislature. A Magistrate who calls upon the treated person to do what in the nature of things is impossible, cannot, by any stretch of language, be deemed to comply even nominally with the requirements of the legislative provisions upon the subject. In the case before us, if we confine ourselves for the present to the enquiry on the requisition upon the basis of the complaint of Von Dippe, we find that it was not till the 20th May 1911 that the Magistrate issued a warrant for the arrest of the petitioner under lawful authority conferred by the Government of India. On the 24th May, the petitioner asked for time to enable him to produce evidence; the application was refused on the ground, substantially, that the Magistrate was under no obligation to grant an adjournment. The Advocate-General has asserted that as the petitioner had been first arrested on the 26th April, he had ample time to produce evidence, that his application for adjournment was made with a view to gain time; and that it is inconceivable that any evidence might be produced which would be of any assistance to the petitioner. I am unable to accept this argument as well founded. It is clear from the record that it was not till the 16th May 1911 that the petitioner was supplied with definite information as to the time and place of the offence alleged to have been committed by him. There is no foundation for the suggestion, therefore, that the petitioner had ample opportunity to produce evidence. But it is important to observe that the Magistrate did not refuse the application for adjournment, on the ground that it was not bond fide. The petitioner was not questioned on the subject, and no attempt was made to elicit information on the point, although the Advocate-General has stated that he suggested to the Magistrate that the petitioner should be called upon to indicate the evidence he

desired to produce. It may well be that if upon an application for adjournment to produce evidence the petitioner refuses to indicate that there is any evidence that exists or is accessible, or is likely to be obtained, the enquiring Court may, in the light of surrounding circumstances, draw an. inference against the bond fides of the application : In re Fares (1883) 15 Fed. Rep. 864. Here, however, the question does not arise. The Magistrate did not investigate the question of bond fides of the application for adjournment, and, on the other hand, based his refusal on an erroneous view of his duty in this respect; this Court consequently cannot well be invited to assume that the application was not bond fide. I must, further, decline to accept the invitation of the Advocate-General to speculate whether any evidence could possibly be produced by the petitioner if his application had been granted. It is undeniable, in my opinion, that the course pursued 'by the Magistrate at the instance of the Crown made it impossible for the petitioner to give evidence in support of his defence. This observation applies with equal force to the case of Kiepert, to which, however, detailed reference is not necessary, because, as has already been held, no prima facie case was there established; but it may be added that the arrest in that case was made on the 20th June, and, after the application for time had been refused, the proceeding before the Magistrate was concluded on the 28th June; obviously, there was not even a semblance of an opportunity-afforded to the petitioner to give evidence in answer to the case sought to be made against him. Nor could evidence have been produced under Section 212 of the Criminal Procedure Code, after the proceedings had terminated, because in each case, after the close of the enquiry, the Magistrate speedily submitted his report to the Government of India and became functus officio in the matter. I think it is indisputable that the petitioner has not been afforded any opportunity to produce evidence, and that this result has ' followed from the acceptance by the Magistrate of the view pressed by the Advocate-General that it was not his duty, under the Indian Extradition Act, to grant any adjournment at all to enable the petitioner to produce his evidence. Under these circumstances, the question arises, whether the detention of the petitioner can be deemed lawful, and whether it is competent to this Court to give directions in the nature of habeas corpus under Section 491 of the Criminal Procedure Code. There can be no doubt that, where the provisions of the statute have not been followed, the report of the Magistrate

cannot afford a foundation for the order of the Government of India under Section 3 of the Indian Extradition Act. It may be conceded that, if this were merely a matter in the discretion of the Magistrate, the Court would not interfere on a writ of habeas corpus, but as was well stated in In re Wadge (1883) 15 Fed. Rep. 864, the position is different if the decision of the Magistrate amounts to a clear denial of a legal right through a manifest abuse of discretion: President of Brooklyn v. Patchen (1831) 8 Wendell 47, 64 where Chancellor Walworth held that when the Court orders the trial to proceed on the erroneous assumption that it has no power to adjourn the trial, it is not merely an improper exercise of discretion, and the error maybe corrected by a Superior Court. I do not wish it to be understood, however, that an arrested fugitive criminal is entitled, as a matter of right, to produce all evidence, that would in the ordinary course be produced at the regular trial in the foreign country after his extradition, although it cannot be disputed that he is entitled at the enquiry before the Magistrate to produce witnesses in his own defence to meet the prima facie case sought to be made against him : R. v. Zossenheim (1903) 20 T.L.R. 121. In the present case, the petitioner had no opportunity to produce any evidence at all, and No. question therefore arises as to the extent to which he would be entitled to produce evidence. The reasonable view seems to be that it is the duty of the Magistrate to take such evidence as may be offered on the part of the accused, and to allow him reasonable time for that purpose, but he cannot claim an indefinite postponement of the proceedings for the purpose of obtaining testimony upon commission from foreign countries; in other words, a full and elaborate trial cannot be substituted for what is only intended to be a preliminary enquiry into the alleged crime : In re Fares (1870) 7 Blatchford 345 : 8 Fed. Cas. 4645, In re Wadge (1883) 15 Fed. Rep. 864, and In re MacDonell (1873) 11 Blatchford 79 : 16 Fed. Cas. 8771. In my opinion, it is clear that in the present case the petitioner cannot be deemed to be legally detained, and it is incumbent upon us to exercise the jurisdiction vested in the Court under Section 491 of the Criminal Procedure Code. I am not unmindful that extradition proceedings should not be conducted in a technical spirit with a view to prevent extradition: see In re Herres (1887) 33 Fed. Rep. 165 where it is said: 'While the Court should review the proceedings to see that no extradition is consummated upon a mere pretext or to subvert private malice, yet if it appears

that the crime has been committed, and probable that the accused has fled to this country for refuge, then a spirit of fairness, expecting that the foreign country will treat extradition proceedings from this country in the same spirit, requires that we act reasonably and justly, having reference more to the substance than to the form of the proceedings.' In the case before us, we do not deal with the matter on grounds which may be deemed purely technical but rather on a ground which goes to the root of the matter, namely, that an order has been made against the petitioner without any opportunity afforded to him to make out his defence. The result must be attributed mainly to the tenacity and success with which the advisers of the Crown insisted upon an expeditious termination of proceedings, which in their earlier stages at any rate might with advantage have been characterised by more faithful adherence to statutory provisions on the subject.

41. On these grounds, I agree with my learned brother Woodroffe that the petitioner must be set at liberty.

Chitty J.

42. For the reasons given by my learned colleagues, I concur in the order proposed.