CALCUTTA HIGH COURT

Legal Remembrancer

Vs.

Matilal Ghose

(Jenkins, C.J.)

30.06.1913

JUDGMENT

Jenkins, C.J.

1. On the 12th of May 1913 Mr. Lionel Hewitt Colson, Special Superintendent, Intelligence Branch, Criminal Investigation Department, Indian Police Service, filed a petition of complaint in the Court of the Additional Magistrate at Barisal, alleging that one Girindra Mohan Das and 43 others had been guilty of offences under Section 121A of the Indian Penal Code. The Magistrate, Mr. Nelson, examined the complainant on oath, recorded his deposition, and directed certain warrants to issue.

2. On the 19th, 20th, 21st, 22nd, 24th, 26th and 30th days of May, articles, it is said, containing comments on the criminal proceeding initiated by this complaint, described as the Barisal Conspiracy Case, were published in a newspaper called the Amrita Bazar Patrika.

3. The Government of Bengal, having been advised that the publication of these articles, and each of them, and in particular the leading article of the 22nd May, 1913, constituted serious contempt of Court, the Advocate-General, on the 6th of June, made an application to a Divisional Bench with a view to proceedings being taken against two persons on the ground that one of them was the editor and manager, and the other the printer and publisher of the Amrita Bazar Patrika newspaper.

4. The Advocate-General purported to apply on behalf of an officer of the Government of Bengal, whom he described as the Superintendent and Remembrancer of Legal Affairs and ex officio Public Prosecutor, Bengal.

5. It appeared to the Division Bench that there might be a difficulty as to an application by the officer so described, and on this being brought to his notice, the Advocate-General stated to the Court that he was moving on behalf of His Excellency the Governor of Bengal in Council. Leave

was accordingly given to the Advocate-General to move on behalf of the Governor of Bengal in Council and not of the officer described as Legal Remembrancer. An order was accordingly drawn up in the following terms: "The Advocate-General of Bengal stating that he moves on behalf of His Excellency the Governor of Bengal in Council and at the instance of the Legal Remembrancer of Bengal, and that the matter is one of urgency, and further stating the facts on which he relies, all of which will be supported by affidavits, which he undertakes to file forthwith. It is ordered that, instead of issuing a Rule, special leave be given to serve notice of motion of the application for Wednesday the 11th day, of June instant at 11 o'clock in the forenoon, such notice to contain a general statement of the grounds. And it is further ordered that the said notice be forthwith served personally on Matilal Ghose, the editor and manager, and on Tarini Kanta Biswas, the printer and publisher of the newspaper called the Amrita Bazar Patrika together with a copy of the petition, affidavits and exhibits and with a copy of this order." A notice of motion was prepared on the same date whereby an order was sought that "Matilal Ghose, editor and manager, and Tarini Kanta Biswas, printer and publisher of the Amrita Bazar Patrika newspaper may be ordered to stand committed to prison for their contempt of Court in respect of the printing and publishing of articles which tend or are calculated to interfere with the due course and administration of justice."

6. The grounds are indicated at the foot of the notice of motion, and consist of a petition of the Superintendent and Remembrancer of Legal Affairs and three formal affidavits proving the presentation of the complaint, the purchase of the paper, and so forth. On the 11th of June, the day named for the hearing in the notice of motion, an adjournment became necessary as the notice had not been served on one of the respondents, owing to his absence from Calcutta, and the motion could not be brought on till the 18th.

7. A contempt of Court of the class with which we are now concerned is a criminal offence and no person can be punished for it, unless that offence be proved by legal evidence: *In re Pollard*[1] I desire to make it clear at the outset that I propose to deal only with Criminal and not with civil contempt.

8. The affidavits in this case show no connection between Babu Matilal Ghose and the impugned articles, and all that there is suggestive of this connection is a statement in the petition on information and belief that he is the editor and manager. But a statement resting on information and belief is not legal evidence in a case like the present: *Queen v. Stanger*[2] It was suggested by the Advocate-General that there was no denial by Babu Matilal Ghose, but, as pointed out in the *Queen v. Stanger*[3] and indeed is obvious, a man in a criminal proceeding need not deny that which is not legally proved against him. Even in a civil proceeding, a statement on information and belief is not admissible, except on an interlocutory application, and then the grounds of such belief must be stated. There certainly was no admission by Babu Matilal Ghose, for he had not time to file an affidavit by reason of the late service on him of the notice of motion, and it was stated before us that he was actually in a position to deny the allegation. The materials, therefore,

necessary to fasten responsibility on him were wholly wanting. The suggestion on the part of the Advocate-General that we should at that stage permit further affidavits or evidence was opposed to the conditions on which alone he obtained leave from the Division Bench to serve notice of motion, as well as to the rules of this Court. Realising his difficulty, the learned Counsel withdrew his motion as against Babu Matilal Ghose with the result that it had to be dismissed with costs.

9. The Advocate-General considered that his purpose would be sufficiently served if he

[1](1868) 5 Moo. N.S. 110; 16 E.R. 457

[2](1871) L.R. 6 Q.B. 352

[3](1871) L.R. 6 Q.B. 352

could proceed against the printer and publisher, for he explained that there was no feeling against any particular individual, and what was desired was to obtain a decision whether the proceedings of inferior Courts could be protected by this Court on a summary application.

10. Had the case against the printer and publisher rested solely on the grounds furnished by those responsible for the motion it must equally have failed. But the application is saved from this by the second respondent's own admission, for, whatever may have been the view in days gone by, I think we can now take that admission into consideration though contained in the affidavit in answer to the motion.

11. So we proceeded with the case against the printer and publisher, and declined to grant the further adjournment for which that respondent prayed, for we felt that it was time the case should be heard and decided.

12. The Advocate-General has contended that the articles justify the advice given to the Government of Bengal and described in these words in the 7th para. of the petition;--" that these articles and each of them and in particular the leading article of the 22nd day of May, 1913, in the circumstances aforesaid constitute a serious contempt of Court, in that the several articles severally and in conjunction are calculated and tend to interfere with the due course and administration of justice and that in particular and without prejudice to the generality of the foregoing the said leading article in the issue of the said newspaper, dated the 22nd of May, 1913, tends to interfere with the course of justice by influencing the minds of persons who may be concerned in the said proceedings as Magistrates, assessors, jurors and witnesses." As a next step in his argument the Advocate-General maintained that the High Court had power to commit for contempt of the Court of a mofussil Magistrate,

13. Mr. Chakravarti for the printer, and publisher accepted responsibility for the articles as printer and publisher, though his client, it is sworn, was not cognizant of them. He, however, repudiated the idea that the articles were intended to be, or were a contempt of any Court; he questioned our jurisdiction to commit for contempt of an inferior Court, and drew our attention to a series of blunders in the procedure, which, he claimed, vitiated the proceedings.

14. There undoubtedly have been blunders which should not have found a place in so important an application. One has resulted in the dismissal, of the motion with costs against one of the respondents at the very outset of the case. With that I have already dealt and I need not notice it further. That on which reliance has principally been placed on behalf of the printer and publisher--whose name, by the way, has been incorrectly given--is that the notice of motion is expressed to be on behalf of the Superintendent and Remembrancer of Legal Affairs and ex officio Public Prosecutor.

15. This is contrary to the condition on which leave to serve notice of motion was given, and the irregularity is the less excusable because this matter was discussed and determined at the time; and our order of the 6th June expressly refers to and embodies the Advocate-General's statement that he moved on behalf of His Excellency the Governor of Bengal in Council. It was for such a motion and that alone that leave was granted. No leave was granted for the motion that has in fact been made. Nor is this all. The Advocate-General in his opening has asked us to act in the exercise of our Common Law powers in oar original jurisdiction. This can only be on the Original Side of the Court, and it has been brought to our notice that the officer described as the Legal Remembrancer is not authorised to represent the Government on the Original Side of the Court. More than that, it has been contended that, at the time when the Advocate-General obtained leave, his appearance before us was unauthorised, as he was not instructed by an attorney, and in fact the warrant of attorney was not filed until some days later.

16. The existence too of such an officer as "a Superintendent and Remembrancer of Legal Affairs and ex officio Public Prosecutor, Bengal" has been questioned, and reference was made to Regulation IX of 1793, Regulation VIII of 1816 and Regulation XIII of 1829.

17. By way of reply certain Government notifications were brought to our notice. But in the events that have happened it is unnecessary to pursue this topic further. Both sides being anxious to have a decision on the merits, we have permitted an amendment that would regularize these proceedings and bring them into conformity with the order of the 6th of June. The necessary authority for this has now been obtained and the required amendment will be treated as made, as though His Excellency the Governor in Council were added as an applicant.

18. Have we then jurisdiction to commit for contempt of an inferior Criminal Court? The question is one of considerable difficulty and cannot, as seemed to be supposed, be solved or even understood by a mere perusal of the decision in *Surendra Nath Banerjee v. Chief Justice and Judges of the High Court*[4] and *Rex v. Davies*[5]

19. To determine the High Court's jurisdiction in this matter involves an enquiry into its constitution and the jurisdiction, power and authority it has inherited, or may otherwise possess, though there was nothing in the argument in support of the motion to indicate that any consideration had teen given to this aspect of the case.

20. By the Indian High Courts' Act (24 and 25 Vict. c. 104), Her Majesty was empowered by Letters Patent to erect and establish a High Court of Judicature at Port William in Bengal for the Bengal Division of the Presidency of Fort William. It was provided by Section 8 that upon the establishment of such High Court, the Supreme Court and the Court of Sudder Dewani Adawlut and Sudder Nizamut Adawlut should be abolished, and that the records and documents of the several Courts so abolished should become and be records and documents of the High Court.

21. By Section 9 it was enacted that "The High Courts to be established under this Act should have and exercise all such Civil, Criminal, Admiralty and Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, Original and Appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established as Her Majesty might by Letters Patent grant and direct, subject, however, to such directions and limitations as to the exercise of Original, Civil and Criminal Jurisdiction beyond the limits of the Presidency town as might be

[4](1883) I.L.R. 10 Calc. 109

[5][1906] 1 K.B. 32

prescribed there by: and save as by such Letters Patent might be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council the High Court should have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the courts abolished under this Act at the time of the abolition of such last mentioned courts." Section 15 provided that the High Court should have superintendence over all courts which might be subject to its appellate jurisdiction.

22. In 1862, the Letters Patent were granted and thereby Her Majesty did erect and establish a High Court at Fort William and constituted the same to be a Court of Record (clause 1). By these Letters Patent, the High Court was vested with Civil and Criminal Jurisdiction, both Original and Appellate. For the present purpose it is only necessary to refer to Clause 26 Whereby it was ordained that the High Court should be a Court of Appeal from the Criminal Courts of the Bengal Division of the Presidency of Fort William and from all other courts whether Within or without the said Bengal Division from which there was then an appeal to the Court of the Sudder Nizamut Adawlut, and should exercise appellate jurisdiction in such cases as were subject to appear to the said Court of Sudder Nizamut Adawlut or should become subject to appeal to the High Court by virtue of such laws and regulations relating to Criminal Procedure as should be thereafter made by the Governor-General in Council. Clause 27 provided for the hearing of referred cases and the revision of criminal trials.

23. By the Letters Patent of 28th December: 1865, the Letters Patent of 1862 were revoked, but it was directed that notwithstanding such revocation the High Court of Judicature should be and continue as from the time of the original erection and establishment thereof the High Court of Judicature at Fort William and should be and continue a Court of Record.

24. Clauses 27 and 28 empower the High Court to hear appeals from Criminal Courts in the provinces and also references and revisions of criminal trials. Thus then the High Court inherited all jurisdiction and every power and authority in any manner vested in the Supreme Court, the Sudder Dewani Adawlut, or the Sudder Nizamut Adawlut.

25. The Supreme Court was established by Charter dated the 26th March, 1774, granted under 13 George III c. 63 and it was thereby constituted a Court of Record (clause 2).
26. By Clause 4 it was ordained as follows: "And it is our further will and pleasure that the said Chief Justice and the said Puisne Justices; shall severally and respectively be and they are all and every of them hereby appointed to be Justices and Conservators of the Peace and Coroners, within and throughout the said provinces, districts and countries of Bengal, Behar, Orissa and every part thereof; and to have such jurisdiction and authority as our Justices of our Court of King's Bench have and may lawfully exercise within that part of Great Britain called England by the Common Law thereof; and we farther will and ordain that all judgments, rules, orders and acts of authority, or power whatsoever, to be made or done by the said Supreme Court of Judicature at Fort William in Bengal shall be made or done by and with the concurrence of the said four Judges or so many or such one of them, as shall be on such occasions respectively assembled or sitting as a court, or of the major part of them so assembled and sitting; provided always, that in case they shall be equally divided, the Chief Justice or in his absence the senior Judge present shall have a double or casting voice."

27. By Clause 21 the Court of Requests and Court of Quarter Sessions erected and established at Fort William, and the Justices, Sheriffs and Magistrates appointed for the said districts were made subject to the order and control of the Supreme Court in such sort, manner and form as the inferior courts and Magistrates of and in England were, by law, subject to the order and control of the Court of King's Bench, and to that end the Supreme Court was empowered to issue writs of mandamus, certiorari, procedendo or error to be directed to such Courts or Magistrates as the case might require and to punish any contempt of a willful disobedience thereunto by fine and imprisonment.

28. It is a sufficiently accurate statement for the purpose of this case to say, that, as the result of this and subsequent legislation, the criminal jurisdiction of the Supreme Court (a part from crimes maritime) was limited to the local limits except as to British subjects, and the Court had no general control or power over mofussil criminal courts. The Common Law was similarly limited in its application to the Presidency towns and to British subjects outside the local limits.

29. The jurisdiction of the Sudder Dewani Adawlut need not be considered. It is true that under 21 George III. c. 70, Section 21, it was constituted a Court of Record, as the result, according to tradition, of insistence by the Chief Justice and Judges of the Supreme Court for a reason peculiar to their relations with the Sudder Dewani Adawlut. But as its jurisdiction was civil, the

powers inherited from this Court are of no assistance in this case. It only remains then to see what was the position of the Sudder Nizamut Adawlut, or the final court of criminal appeal from the mofussil. Its earlier history is set out in the preamble to Regulation IX of 1793. At that date it consisted of the Governor-General and Members of the Supreme Council assisted by the head kazee and two mooftees.

30. By Regulation II of 1801 3, its constitution was altered, and thenceforth the court was to consist of three judges.

31. In the course of time the same Judges presided over the Sudder Nizamut Adawlut and the Sudder Dewani Adawlut, but the two courts were distinct. I have been unable to discover any statute which made the Sudder Nizamut Adawlut a Court of Record, nor can I find any indication that it was so regarded. Every Court of Record is the King's Court and all such Courts are created by Act of Parliament, Letters Patent, or prescription (see Bacon's Abridgement, Vol. II, p. 392; Stephen's Commentaries Vol. III).

32. Not only then is there nothing to show that the Nizamut was created a Court of Record by Act of Parliament, Letters Patent or prescription, but it is not a King's Court, being only a Company's Court, and in theory derived its jurisdiction and authority, not from the British Crown, but from the country Government in whose name the Company acted. (See Ilbert's Government of India, 1st Edition, page 46).

33. But if it was not a Court of Record, then it is difficult to see what power it could have had to commit. *McDermott v. Judges of British Guiana*[6] *Kochappa v. Sachi Devi*[7]

[6](1868) L.R. 2 P.C. 341 [7](1902) I.L.R. 26 Mad. 494

34. This view is fully borne out by a circular order of the Sudder Nizamut of the 3rd of February, 1843, to be found in the collection of orders brought out by Mr. J. Curran. It appears from that order that it was brought to the notice of the judicial, authorities that Act. XXX of 1841 was the only law under which contempt of, court could be punished.

35. Act XXX of 1841 is an Act for repressing obstructions to justice in certain courts, of the East India Company, and by I it is enacted that all persons using menacing gestures or expressions or otherwise obstructing justice in the presence of any Zilla or City Magistrate, Joint Magistrate or other officer under a Magistrate empowered to try a civil case, or any superior or interior court, civil or criminal of the East India Company, shall be liable to be fined by the authority whose proceedings are obstructed, to any amount not exceeding ₹ 200, or, in case such fine be not paid, to be imprisoned for any period not exceeding one month. This was followed by a proviso that notwithstanding anything in the Act, it should be lawful to indict any person amenable to Her Majesty's Supreme Court, as for a misdemeanor in any of the cases aforesaid sustainable before this Act, if no proceeding shall have been had against the offender in the court where the offence was committed but not otherwise. This then shows that the power to commit was only for contempt in the face or the court, that the punishment was in the first instance fine, that the

punishment was to be inflicted by the authority whose proceedings were obstructed, and that no power was vested in the Sudder Nizamut to punish for contempt of an inferior court.

36. This then would seem to have been the position prior to the establishment of the High Court. The Supreme Court would have had no jurisdiction to protect a mofussil Criminal Court by summary proceedings in a case like the present. The matter would have been wholly outside the authority of the Sudder Dewani Adawlut. And though the Sudder Nizamut had a power of superintendence over the mofussil Criminal Courts, it had not any power to commit for contempt of those Courts.

37. If that be so, the jurisdiction now invoked cannot have been inherited from any of the three abolished courts.

38. So it has to be seen whether it became vested in it by the Charter Act of 1861 or the Letters Patent under that Act.

39. So far as this Presidency is concerned the application is novel and the case is one of first impression.

40. It is argued, however, that the decision in *Rex v. Davies*[8] and the decision in *In re Venkat Rao* are authorities on which we ought to act. This has been vigorously controverted by Mr. Chakravarti.

41. *Rex v. Davies*[9] came before the King's Bench Division on a rule for a writ of attachment for contempt of court. This contempt consisted of the publication of articles in a newspaper calculated to give an exceedingly unfavourable impression of a prisoner, who had been arrested and brought before the Magistrate. The publication was while the case was still before the Magistrate and prior to committal. It was held that the High

[8][1906] 1 K.B. 32

[9][1906] 1 K.B. 32

Court had power to attach, first, because the case might come to the assizes for trial,
and secondly, because, even if the committal had actually been made to the quarter session, still the King's Bench Division, as the inheritor of ail the jurisdiction and powers of the Court of King's Bench, possessed this summary power of punishment.

42. It was on the second of these two grounds that the Advocate-General relied in his opening.

43. This phase of *Rex v. Davies*[10] demands close attention in order to see whether it rests on reasoning which can legitimately be applied here. Certain links in that chain of reasoning are evident: others perhaps are not so clear.

44. First then, the jurisdiction assumed in *Rex v. Davies*[11] was inherited, if at all, from the old

King's Bench and not from the other Courts of Record which became amalgamated in the English High Court, though those courts too had the power to commit for contempt of themselves that belongs to every superior Court of Record.

45. Next, this jurisdiction inherited from the Old King's Bench was of a special character, and, unless I have misread the judgment, it rested on that Court's power to punish every kind of misdemeanour, in that it was, in a special manner, the guardian and protector of public justice throughout the kingdom, the "custos morum", a dignity that reverted to it or was revived on the abolition of the Star Chamber by 16 Char. I. c. 10. Ordinarily misdemeanour was punishable by indictment or information, but when it was a contempt of Court it was also punishable brevi manu" by attachment. When this summary proceeding was first used is in some doubt; but the opinion has been expressed that the earliest instance of its use, where the contempt was an attack on a Judge not in the face of the Court, was in 1720.

46. The fact that there was an alternative mode of bringing the offender before the Court where the misdemeanour was a contempt of court was merely a difference of procedure; the subject-matter was the same, that is to say, the prosecution of an offence in the Court of King's Bench.

47. The helplessness of the inferior Court and its subjection to the superintendence and control of the King's Bench were not the foundation of the jurisdiction, but merely the occasion and the reason for its exercise.

48. This is made clear by the essential difference between the jurisdiction exercised by the Court of King's Bench and that exercised by the other superior Courts of Record which possessed no relations with the inferior Courts, a difference that relates both to the foundation and object of the jurisdiction. And it is important here to note that the learned Judges seem to have thought that it would be within the jurisdiction of the King's Bench to punish as an offence any improper interference with the administration of justice in the superior Courts, and that the reason why the Court of King's Bench did not concern itself with contempts of the other superior courts was that they possessed ample means and occasions for protecting themselves.

[10][1906] 1 K.B. 32

[11][1906] 1 K.B. 32

49. On these grounds the Court arrived at the conclusion that the proceeding before it was nothing more than the legitimate application to now circumstances of the old principles of the Common Law.

50. Those principles of the old Common Law must I think, be that the Court of King's Bench as the "custos morum" had jurisdiction to punish on a summary proceeding as well as on indictment or information all offences in the kingdom being a contempt of Court as tending to interfere with the administration of justice. When the Court so impeded or embarrassed was an inferior Criminal Court, unable to protect itself but under the superintendence and control of the Court of King's Bench, the case was one in which it would be right that the Common Law principles

should be applied on a summary proceeding.

51. Have we then these powers? Has this High Court Common Law powers that would enable it to punish as an offence, on a summary proceeding, conduct in relation to a proceeding in a mofussil Criminal Court and not in the face of that Court, such conduct not being an offence under the Indian Penal Code, Act XLV of 1860? The preamble of this Act shows it was intended to be a general Penal Code for British India, but it contains no specific repeal of the penal laws then in force. This was intentional, as it was considered possible that some offences might have been omitted which it would not be intended to exempt from penal consequences. Not only the facts with which we are concerned do not amount to an offence under any Act passed after the Indian Penal Code, but I cannot find that they would have been an offence under the criminal, law in the mofussil prior to the Code. And here I may again refer to Act XXX of 1841.

52. It is conceivable that there might be facts which would constitute an offence in the nature of a con tempt of an inferior Court within the limits of the High Court's Original Jurisdiction, as being a misdemeanour under the Common Law, and that it could be punished on a summary proceeding, but that would be of no help, as I am now considering whether what has been done could be punished by the High Court on a summary proceeding as a contempt of the Magistrate's Court at Barisal.

53. I have already pointed out that by Clause 21 of the Charter of 1774, inferior criminal courts and Magistrates were made subject to the order and control of the Supreme Court "in such sort, manner, and form as the inferior courts and Magistrates of and in England are by law subjects to the order and control of our Courts of King's Bench." And I would recall that to this end the Supreme Court is expressly empowered and authorized only to award and issue a writ or writs of mandamus, certiorari, procedendo, or error to be directed to such courts of Magistrates as the case may require and to punish any contempt of a willful disobedience thereunto by fine and imprisonment.

54. This is not without its bearing on the question whether it is open to this court to adopt the extended application of common law principles sanctioned by *Rex v. Davies*[12]

55. The relations between the Supreme Court and the inferior courts of the Presidency town does not rest on the adaptable foundation of the Common Law, but on the Acts and Charter, and it certainly is a question whether this Code, so constituted did not crystallize

[12][1906] 1 K.B. 32

these relations and the consequences to which they could give rise. It may be that the authors of the Charter did not anticipate the development expounded in *Rex v. Davies*[13] And they were lawyers of no slight eminence, for it is a matter of history that the original draft was perused by the Attoney-General, who afterwards became the Lord Chancellor, Lord Thurlow was altered by the Solicitor-General, who afterwards became the Lord Chancellor, Lord Loughborough, and

was revised by the Chief Justice of the Common Pleas, and by Earl Bathurst, then the Lord Chancellor of England. Its parentage therefore was above reproach.

56. But however that may be, the Courts and Magistrate which are indicated in Clause 21 are those, not of the mofussil but of the Presidency town, and I am not aware of any statutory jurisdiction possessed by the Supreme Court over mofussil Magistrates except as provided in 53 George III c. 155, or in relation to offences against them (if I may use that phrase) except to the extent indicated in Act XXX of 1841.

57. It is true that the High Court not only has superintendence over the courts of mofussil Magistrates, but also is a Court of Record; if I am right, however, in my reading of *Rex v. Davies*[14] superintendence does not give jurisdiction, while the power of the King's Bench to punish for interference with the lower courts did not arise from its being a Court of Record but from its Common Law powers as custos morum. I have studied as best I could the decision in *In re Venkat Rao* . But to appreciate the ratio decidendi in that case it would be necessary to possess an intimate acquaintance with the nature and limits of that Court's jurisdiction inherited from its predecessor or vested in it by its present Charter. None of the materials necessary for this purpose have been placed before us, nor have I been able to discover how far the English Common Law prevails in that Presidency outside the Presidency town. This limits the assistance I have been able to derive from this decision.

58. For the reasons I have expressed I think the ground on which the Advocate-General founded his claim in his opening speech fails. And I may here point out that this would hardly have been a satisfactory basis for the jurisdiction invoked, as it would be of use only where the Common Law prevails. A jurisdiction so founded would, as far as I can see, be of no use to the High Court of Allahabad, to any High Court established under the recent Act, or to any of the Chief Courts, but would belong only to the three High Courts which are vested with Common Law powers.

59. But it was indicated to Mr. Chakravarti by the Court in the course of his argument that we would desire him to consider whether this Court could not, as a Court of Record, commit for contempt on what I have already described as the first ground in *Rex v. Davies*[15] that is to say on the ground that there was. an independent contempt of this Court as distinct from the inferior Court, inasmuch as the case might come before this Court either for original or appellate trial at one stage or another. In the ordinary course of criminal procedure the case would not come before this Court for original trial. It might be transferred here by an order of the High Court on special grounds, but there is nothing before us to show that they exist. It might also come before this Court under the Indian Criminal Law Amendment Act, 1908; but this could only be, if it appeared to the

[13][1906] 1 K.B. 32 [15][1906] 1 K.B. 32

[14][1906] 1 K.B. 32

Governor-General in Council or to the Local Government, that in the interests of peace and good order the provisions of Part I of the Act should be made to apply. Here again there is nothing

before us to indicate that it does so appear to those authorities. For the purpose in hand I think we should disregard remote possibilities and act upon the assumption that the normal procedure will be followed. And in support of this I may recall the fact that though counsel in *Rex v. Davies*[16] relied on the possibility of removal of the case into the High Court by certiorari, it was apparently not regarded as deserving of notice in the judgment. I therefore put aside the contingency, which on the materials before us is remote, of the case coming before this Court on original trial.

60. But it may come before us on appeal, either at the instance of any person convicted (Criminal Procedure Code Section 410), or conceivably though not probably, at the instance of the Local Government in the event of an acquittal (Section 417 of the Code). If the appeal were by the accused, the result of the trial would go to show that there had been no serious interference with the course of justice to the prejudice of the prosecution.

61. Now this Court is a Court of Record in all its jurisdictions, and it thus has power to commit for any contempt in relation to any of those jurisdictions: *In re Abdool and Matab*[17]

62. Thus I have no doubt that were there to be an interference with the due administration of justice by a Division Bench in relation to a criminal appeal pending before it, and that interference amounted to an offence, this Court on its Crown side would have power to punish it as a contempt on a summary proceeding.

63. And I would go further and say that it might be cogently argued that there was this power even before the appeal was pending before this Court, but to avoid possibility of misunderstanding I again emphasize this would be on the ground that the contempt was of this Court and not of an inferior court.

64. I have expressed myself thus guardedly as the matter is one of some difficulty, and it has not been discussed in the course of the argument. It may be, if the matter ever comes up for consideration, that convincing objections could be urged against this more extended jurisdiction. Nor can I overlook the fact that where a contempt in relation to an English County Court was under consideration, it was said by Mellor, J., in *Queen v. Lefroy*[18] that what might be called contempt out of court was left to be punished by the general law of the land by indictment or otherwise. Similarly Cave J. delivering the judgment of the Court in *Queen v. Brompton C.C. Judge*[19] expressed the view that contempt of a County Court Judge was punishable by indictment and not summarily. And though an appeal lay from the County Court to the High Court, there was no suggestion that the High Court on that ground had power to punish summarily for contempt of itself. I do not attach so much importance to the fact that no reference is made in *Rex v. Davies*[20] or *Rex v. Clarke* to the fact, that the case might come before the High Court otherwise than on committal for trial, for that result would not be in the ordinary course. In saying this I do not forget that *Rex v. Clarke*[22] was subsequent to the establishment of the new Court of Criminal Appeal, but it is to be noticed that this Court was established in

[16][1906] 1 K.B. 32 [18](1873) L.R. 8 Q.B. 134 [20][1906] 1 K.B. 32 [22](1910) 103 L.T. 636
[17](1867) 8 W.R.Cr. 32 [19][1893] 2 Q.B. 195 200 [21](1910) 103 L.T. 636

1907 as a district Court, for though the presiding Judges are selected from the Judges of the King's Bench Division, it does not appear clear that it is an integral part of the High Court. I feel the more justified in leaving this precise question open, for I am convinced that, even if what I have described as the more extended jurisdiction in relation to contempt of this Court exists, no ground has here been shown for its exercise.

65. At the outset it has to be borne in mind that what might have been a contempt of the inferior court would by no means necessarily be a contempt of this Court. Thus an attack upon the Magistrate any endeavor to corrupt him, or any direct obstruction of his proceedings would not, speaking generally, be a contempt of this Court.

66. And the only way in which it could be contended, in the circumstances of this case, that there had been a contempt of this High Court, would be perhaps by showing that witnesses had been attacked, deterred and frightened, to use the language of Blackburn J., in Skipworth's Case (1873) L.R. 9. Q.B. 230, 232, or in some manner dissuaded, hindered or prevented from giving evidence.

67. After careful and repeated consideration of the impugned articles, I come unhesitatingly to the conclusion that, whatever censure they may merit, they do not come under that particular censure.

68. The Advocate-General has taken us through the articles in minute details and has represented to us with insistence that in some respects their culpability could hardly be exceeded. He appears to me to have formed an exaggerated notion of their effect.

69. If the whole series of articles be read, it will, I think, be found that the more prominent topics are (i) remonstrance against universal house searches, (ii) protests against the harsh treatment of those arrested, (iii) deprecation of methods attributed to the police, (iv) requests that the case should not be tried before a Special Magistrate, and (v) an appeal to the recognized fairness of the Government, accompanied with some measure of advice. In the course of discussing these topics expressions are used here and there to which exception has been taken.

70. No suspicion of contempt of this Court is to be found in the 1st, 2nd, and 5th of these topics even if there be involved in them what appeared to the Advocate-General to be the inexcusable presumption of offering advice to the higher authorities. The 4th topic, that is, the request that the accused should not be tried before a Special Magistrate and the assertion that a conviction by him would not command public confidence, show that the writer knew very little about what he was discussing, but this I believe sometimes happens even in journalism. He might as well have protested against trial by court martial. The case could not be tried, and the accused could not be convicted by a Special Magistrate; their rial in the normal course could only be before a Sessions

Judge sitting with assessors, and against such a tribunal not a word has been said. Nor could the writer have possibly meant that the enquiry should not be before a Magistrate, as that is the only tribunal, before which it could be held. But apart from all this, there is nothing in the discussion of this topic that is in any degree a contempt of this Court.

71. There only remains the third topic, the deprecation of methods attributed to the police. It is no part of our duty to reprehend that which cannot properly be the subject of legal censure. Still I do strongly feel that indiscriminate attacks on this force are themselves to be deprecated. Where definite misdoing is established, by all means condemn with all emphasis the misdoer and his misdeed. But general abuse merely defeats its own end, for it is the tendency of men to become what they are depicted.

72. No doubt a distrust of the police is expressed, but however undeserved it may be, it is, I think, too sensitive a mind which would perceive in the article a contempt of this Court. There is no denial of guilt, on the contrary the wish is expressed that the guilty should be arrested and punished. And I am unable to hold that witnesses would be deterred from giving evidence by reason of this attack on police methods or of anything contained in the articles. I have examined and re-examined the articles to see if they could reasonably produce this consequence, but I come without doubt to the conclusion that they could not. And indeed this was not the principal attack made on them in argument.

73. I purposely refrain from quoting the articles, or extracts from them, at length, for it would serve no useful purpose, but there are one or two passages to which I must refer because they have been made the subject of special animadversion by the Advocate-General. In the article of the 22nd of May there is the following passage: "Why should the defendants in the present case, at least such of them against whom there is no positive evidence, be handcuffed or refused bail and made to rot in jail before they have been found guilty." Here, it is said, is an assertion that against some of the accused there is absolutely no evidence.

74. To begin with, that is not what was written; there is a surmise that there may be some accused against whom there is not positive evidence. The Advocate-General repudiated the idea that the word "positive" could qualify or really narrow the character of the evidence. I was surprised at this suggestion, and I find I was fully justified in such surprise, for there is very high authority for the view that "positive evidence" has a recognized and distinct signification and that it means evidence "which goes expressly to the very point in question; and that which, if believed, proves the point without aid from inference or reasoning as the testimony of an eye-witness to an occurrence as distinguished from indirect or circumstantial evidence."

75. The surmise therefore has not the sinister meaning ascribed to it; and moreover some regard must be had to the obvious purpose of the sentence, and to the topic of which it forms a part. It is not suggested that in no case should the accused be put on their trial; on the contrary it is

expressly said that if His Excellency is convinced that a prima facie case has been made out, the accused must stand their trial. The suggestion as to His Excellency is condemned, but after all, this is substantially only what the law provides, for a Court cannot take cognizance of any offence punishable under Chapter VI of the Indian Penal Code unless upon complaint made by order of, or under the authority, from (amongst others) the Local Government, or in other words, the Governor in Council (Criminal Procedure Code Section 196).

76. It need hardly be said that the Governor in Council would not make this order or grant this authority unless he had reason to believe that a prima facie case had been made out.
77. The conclusion then to which I come is, that though we may have jurisdiction to commit for contempt of the High Court in a case of this class, still in the present case no contempt justifying summary action on our part has been established.

78. As the contempt of inferior Courts has been so much under discussion in this case, I would take this opportunity of urging, as earnestly as I can, the propriety of abstaining from comment on pending cases in whatever Court they may be, or whatever stage they may have reached. The responsibility of a judicial tribunal is at all times great, and I do not think I ask too much when I ask in the interests of judicial officers working in the mofussil districts of this Presidency, that the weight of that responsibility should not be increased, however unwittingly, by comments on the cases before them, or on themselves in connection with those cases. I am tempted here to quote the words of Blackburn J., in Skipworth's Case (1873) L.R. 9 Q.B. 230, 237 where he said: "It is not right that a Judge... when personal attacks are made on him, should come forward and meet them and explain them, and that is well known to those who make the attack, and certainly that knowledge does in my mind render the conduct of those who attack a Judge in that way, to use the mildest term, neither just nor decorous." The learned Judge was speaking of those who could in some measure protect themselves: how much more forcibly do his words apply to those who have not that power.

79. Then this motion raises a question of high importance, which it would not be right for me to pass by without remark. I allude to the question--what circumstances ordinarily justify recourse to this summary process of contempt.

80. It is not enough that there should be a technical contempt of Court: it must be shown that it was probable the publication would substantially interfere with the due administration of justice.

81. And there is good reason for this: what is charged is a criminal offence, and the trial is not in accordance with those safeguards thai the ordinary procedure for the trial of a criminal offence requires, but by way of summary proceeding. Lindley L.J. declared in *O'Shea v. O'Shea and Parnell*[24] that this was the only offence of which he knew, that was punishable at Common Law by summary process.

82. It is therefore no matter for surprise that the cases are my of warnings that this arbitrary, unlimited and uncontrolled power should be exercised with the greatest caution: that this power merits this description will be realised when it is understood that there is no limit to the imprisonment that may be inflicted or the fine that may be imposed save the Court's unfettered discretion, and that the subject is protected by no right of general appeal.

83. Thus we find Lord Morris in delivering the judgment of the Privy Council in *McLeod v. St. Aubyn*[25] describing committal for contempt of Court as a weapon to be used sparingly and always with reference to the interests of the administration of justice. This is an authority that must command our respect. But it does not stand alone. In *Plating Co. v. Farquharson*[26] after saying that the practice of making their motions against innocent

[24](1890) L.R. 15 P.D. 59, 64 [26](1881) 17 Ch. D. 49 Jessel M.R

[25][1899] A.C. 549

people ought to be discouraged as far as possible, adder "they lead to great waste of time and to a considerable amount of costs and unless the Court is satisfied that the publication is a contempt which interferes with the coarse of justice, of course, the Court ought not to interfere;" while James L.J. said of the motion made against the proprietors of the newspaper who inserted an advertisement in the ordinary course of business, that it seemed to him to be idle and extravagant and a thing to be strongly discouraged. And later he says: "I think these motions are a contempt of Court in themselves, because they tend to waste the public time."

84. In *Reg. v. Gray*[27] Lord Chief Justice Russell spoke of this jurisdiction as one to be exercised with scrupulous care and to be exercised only when the case is clear and beyond reasonable doubt.

85. Other opinions to the same effect might be multiplied, but these will suffice as an indication of the care and reserve with which these applications Should be made. I will therefore limit myself to the citation of two cases which give an instructive illustration of the application of these principles. In *King v. Dolan*[28] proceedings were taken against Mr. Walter Long for a speech delivered by him commenting on a criminal case, and against others as connected with newspapers which published the speech.

86. This speech was an adverse comment on the failure of a jury to convict, made at a time when there was the prospect of a new trial.

87. It was said that language had been employed the use of which was much to be deprecated and the speech was described by one of the learned Judges as capable of having the effect of prejudicing the trial, so that it appeared to him, that in that sense it constituted a contempt. But he goes on to ask, "is the contempt of so serious a character as, in the circumstances disclosed, to call for the exercise of the very special and summary jurisdiction vested in the Court?" His answer was in the negative, and in arriving at this conclusion the learned Judge explained that he was influenced by the leaning of the Courts in the more recent cases of alleged contempt to

discourage applications where notwithstanding the prima facie tendency of the language, there was no real prejudice created or no real case made for the interference of the Court. The judgment of the Lord Chief Justice is particularly instructive. He points out that for the purpose in hand there is no difference in principle between a prosecution and an action, and further that there is nothing more calculated to defeat the ostensible object of the motion than the motion itself.

88. Then after discussing the facts, he observes, "What does this all amount to? A possibility upon a possibility, a remote contingency upon a very remote contingency. We must look at the realities of things."

89. The learned Lord Chief Justice then cites the case of the Evening Standard which was described by Darling J. as one of extraordinary indiscretion and impropriety showing a very slight regard for the administration of justice by the Courts of the King, yet upon the ground that he could not say it was really calculated to prevent a fair trial, he thought

[27][1900] 2 Q.B. 36

[28](1907) 2 Ir. Rep. 260

there should be no rule granted. Phillimore J. expressed his agreement and said he was very glad to have that opportunity of saying what he had to say, and what he had said before and what he said every time--that the world had gone mad on the doctrine of contempt of Court, and the doctrine ought not to be extended. These cases expound in the clearest terms the caution and reserve with which proceedings such as the present should be initiated, and no Court in the due discharge of its duty can afford to disregard them.

90. This motion against T.K. Biswas has wholly failed and in my opinion it must be dismissed. This respondent has been brought before the Court at considerable cost to himself, and the usual rule, when a motion for contempt is dismissed, is that the respondent's costs should be paid. In this case I think it would be but right that the respondent should receive his costs and that, to ascertain them, they should (if necessary) be taxed as between party and party as though in a hearing on the Original Side.

91. The order for costs will, as a matter of form, be against the Legal Remembrancer, the sole applicant on the record until the close of the case,--no costs were incurred after the amendment of the record by the addition of the Government.

92. But doubtless the Government will defray the costs that thus fall on their officer.

Stephen, J.

93. This matter comes before us on a motion by the Advocate-General, as to the framing of which I have nothing to add to what has fallen from the Chief Justice.

94. The substantial questions that we have to decide are whether the publications complained of

constitute a contempt of Court, whether we have power to commit the respondent for having printed and published them, and whether we ought to do so. Dividing the law from the fact, the questions become, first, what jurisdiction have we to deal with this matter, and, secondly, has the respondent been guilty of contempt?

95. On the first point, the facts are of the simplest, and not in dispute. The respondent printed and published in Calcutta comments on events connected with a charge that had been made against a number of persons of an offence under Section 121A of the Penal Code. The offence was said to have been committed in Barisal, and at the time of the publication complained of, warrants had been issued for the arrest of persons against whom complaints had been made, and it appears that some of them at least had been arrested. Under these circumstances, supposing the comments in question to be contumacious, what power have we to deal with them summarily? The power must in any case have its origin in the Common Law of England, and before we can exercise it, it is necessary to see whether it has been conferred on us. Since the decision in *Surendra Nath Banerjee v. Chief Justice and Judges of the High Court*[29] there is no doubt but that we have such a power in cases of contempts of this Court committed in Calcutta, derived from 13 George III c. 63, and the High Courts Act, 1861 (24 & 25 Victoria c. 104, Section 9. But here, though the contempt takes place in Calcutta, it is in the first place a contempt of another Court; and under what enactment or under what general principle of law can we take on ourselves to act in such a matter? It seems to me that there are four ways in which such a power can have been conferred on us. The power may have been

[29](1883) I.L.R. 10 Calc. 109

possessed by one of the Courts abolished and superseded by us in 1864 and we may have derived it from such Court, as though by inheritance under Clause 9 of our Charter. Secondly, the power may have been conferred on us or them directly by legislation. Thirdly, as we have a power of superintendence over the inferior criminal Courts, we may have corresponding power of protection. Fourthly, it may be that as appellate powers have been conferred on us as a Court, any act that tends to impede the course of justice in a Court from whose decision there is an appeal to us, and in particular any act that tends to prevent evidence being given there, or to taint such evidence, is a contempt of this Court.

96. To the supposition that we have inherited any power of commitment innate in any of the previously existing Courts, an objection which seems to me insuperable suggests itself at the outset. Under the High Courts Act, we inherit the powers vested in the Sudder Dewani Adawlut and the Sadder Nizamat Adawlut, which divided between them what are now our appellate powers of criminal and civil jurisdiction respectively. Any power to deal with contempts in criminal cases in the mofussil that we may have inherited, we must therefore have inherited from the Sudder Nizamat Adawlut, and there is nothing to show that Court was ever a Court of Record, a characteristic which is a qualification to the exercise of any power to commit. The Sudder Dewani Adawlut became a Court of Record by the East India Company Act of 1780 (2, George III, c. 70), but it was not till 1793 that the new Sudder Courts were connected by the

Judges of one being the same as the Judges of the other, and the difference between the two lasted till the end. If it is argued that as a Court of Record we supply the one thing lacking to the Sudder Nizamat necessary to qualify it to commit, this takes the question out of the realm of inheritance and anticipates arguments that must be noticed hereafter.

97. If we have not inherited the power, has it been conferred on us by direct legislation? For myself I can only say that our attention has not been drawn to any such legislation, and that examination of such Acts and Regulations as would be most likely to confer it, if it has been conferred, has not guided me to any. It is true that by their Original Patent of 1774, the Chief Justice and Puisne Judges, our predecessors in the Supreme Court, had such jurisdiction and authority throughout Bengal as Justices of the King's Bench had in England. But this seems not to confer any power on the Court, as distinguished from its members, and it is not suggested now that we have outside the scope of our original jurisdiction, any such general power of correcting what is wrong with the administration of justice, as from a very early date has been attributed to the King's Bench in England, and is recognized in *Rex v. Davies*[30] by describing it as custos morum. Indeed when power was given to Justices of the Peace and Zillah Courts to try British subjects in the mofussil, it was considered necessary to give a power of proceeding by certiorari limited to much narrower bounds than that possessed by the King's Bench.

98. In the early days of the Supreme Court, those whom we may regard as our predecessors in office encountered several difficult passages before the limits of their jurisdiction were finally recognized, I do not understand that the Advocate-General wishes to revive the questions that were once so agitating by assuming a position which is based on merely historical grounds, and is perhaps more ours than his. But for myself I cannot help feeling that a trace of 150 years has some significance; and since, as far as

[30][1906] 1 K.B. 32

appears, we have not in our Original Jurisdiction exercised any powers under the Common Law outside our local jurisdiction during, say, the nineteenth century, I feel a reluctance to attempt to do so now. If we derive no rights for the present purpose from the Charter of 1774, still less do we derive them from any provision under the present Charter, sitting as we are in our Original Criminal Jurisdiction: for it is not suggested that that jurisdiction has been in any way extended.

99. The next point is that as we have a power of superintendence over the inferior Courts, so we have also a power to protect them from improper interference. The argument is an attractive one because, as is said by Wills J. in *Rex v. Parke*[31] "it would seem almost a natural corollary" that a Court which controls an inferior Court should have power to protect it from "unlawful attacks and interferences with their independence": but the decision of the point is purposely avoided. In *Rax v. Davies*[32] however, the Court definitely took on itself the duty of protecting an inferior Court from improper interference in a case which it treated as being one thai could not in the ordinary course come before it. But after a careful study of the case I am unable to read it as saying that control or superintendence necessarily implies a power to protect. The reasoning on

which the decision depends is, as I apprehend it, that the King's Bench control inferior Courts, being "in a special manner the guardian and protector of public justice throughout the kingdom"; it is almost suggested that it might protect Courts of equal authority, such as the Court of Chancery, and only does not do so because they can protect themselves. The power of punishing contempt is not so much to protect the Court or individual Judges from a repetition of offences against them, as to protect the public "specially those who are either voluntarily or by compulsion subject to (the Court's) jurisdiction from the mischief they will incur if the authority of the tribunal be condemned or impaired." To limit the power of committal to attacks on the committing Court would be to act on the wrong principle that the offended dignity of a Court is the subject of punishment. If an unimpeded course of justice is to be secured to inferior Courts, it must be done by the King's Bench and "if it be true that the King's Bench is in any sense the custos morum of the kingdom, it must be its function to apply with the necessary adaptations, to the altered circumstances of the present day the same great principles that it has always upheld." The Court accordingly held that it could protect an inferior Court in the trial of a case that could never in ordinary course come before the King's Bench. The decision is admittedly a new departure in the sense that it applies an old principle to circumstances that are, for reasons given, such as have not risen before. But I cannot read the decision otherwise than as depending on general powers possessed by the King's Bench to secure a proper administration of justice to His Majesty's subjects, which I cannot find to have been conferred on us. It is therefore impossible to hold that our powers of superintendence imply any power of protection.

100. In the last place if the case that was being investigated at Barisal when the comments we have to consider were published should result in a trial and a judgment, that judgment may very well come before as on appeal in the ordinary course. That appeal will be tried in this Court on the evidence given in the Court at Barisal. As a matter of principle it seems to me undeniable that we have a right to treat as a contempt any act committed within the local limits of our original jurisdiction that may affect its trial on appeal, and in

[31][1903] 2 K.B. 432, 442

[32][1906] 1 K.B. 32

particular any act that may tend either to taint or impair that evidence or to cause evidence that would otherwise be forthcoming to be withheld. I do not mean to say that this indicates the limits of our jurisdiction; but in this case the acts complained, of, namely printing and publishing, were committed in Calcutta and on the facts of the case I do not think that the contempt alleged need be considered from any point of view except the effect that it may have on the evidence to be given at Barisal. There is no authority on the subject, because till the establishment of the Court of Criminal Appeal in England in 1907 [after *Rex v. Davies*[33] had been decided] there was no appellate court in a position similar to ours, and it is therefore enough for me to state my opinion without amplifying it.

101. Turning now to the comments complained of, I will first consider what their effect really is, and then whether they constitute a contempt that we ought to punish summarily, bearing in mind that we have to consider the matter only from the point of view of an appellate court. The

comments were published on the 19th, 20th, 21st, 22nd, 24th, 26th and 30th of May, so that one may fairly be used to indicate the meaning of another; and with them must be considered an article of the 20th May put in by the respondent.

102. It is not necessary to consider the publications complained of in great detail, and it is not easy or perhaps possible to summaries them fairly. I will therefore, only say that they seem to me certainly to contain allegations, or at least suggestions, that the police are collecting evidence unfairly and harshly and may be expected to contrive to bring forward a false case which they have opportunities for doing. Arrests are being made with unusual harshness. If the case is tried before a Special Magistrate, the police will have it all their own way. The case should be tried before a so-called Special Tribunal. These allegations, repeated with details, which need not be considered, and with various florid terms of speech form the staple of the publications complained of.

103. The conclusion that I draw, from a careful and repeated examination of the publications placed before us, is that the writer in the first place wishes to attack the police and executive rather than judicial authorities, and to lay a foundation for saying that any convictions that may take place have been obtained by improper means. He is ignorant of the procedure which will be followed, he misnames the trying court, though I do not think he can be heard to say that when he speaks of a Special Magistrate he does not mean a Sessions Judge, and his impressions as to the effect of the Criminal Law Amendment Act 1900, and the Conspiracy Act, 1912, are erroneous. He writes recklessly, and in addressing readers more ignorant than himself misrepresents the law. I consider that he is ready to use any possible argument for effecting his purposes.

104. For our immediate purposes, I need not consider any other aspect of this conduct than its effect on the hearing of a possible appeal. And I can come to no other conclusion than that this will probably be negligible. The case will not be tried before a Jury. The writer may, in the words of Lord Alverstone in *Rex v. Tibbits*[34] "produce... an atmosphere of prejudice in the midst of which the proceedings"--that is the trial--"must go on." He may thereby make the duty of the Sessions Judge more difficult than it would otherwise be, but he will not affect the Court of Appeal. Besides he is writing long before the trial, and the danger to be apprehended in *Rex v. Tibbits*[35] that they will have knowledge of

[33][1906] 1 K.B. 32
[34][1902] I.K.B. 77
[35][1902] I.K.B. 77

facts that they ought not to have, is not present in this case. Most of the English cases relating to this kind of contempt have in view this particular danger, namely that a jury may be unduly influenced. This does not apply here. But there is in India a danger that does not exist to the same extent in England. Witnesses are more easily influenced here than they are there and writings such as we have before us may have the effect of deterring them from giving evidence which in the interests of justice should be given. For my part I should be willing to apply the law of contempt in India to the purpose of protecting witnesses, as it is applied in England to the

protection of juries, a course which is fully justified by numerous authorities. But in the present case I cannot consider that there is sufficient probability of witnesses being improperly influenced to justify us in committing the respondent.

105. There is good authority for saying that we are to consider the effects of the respondent's action rather than his intentions. But contempt is to be treated as a crime, though it may not be one in India as it is in England, and we do not need the abundant authority that there is on the point to say that, before we commit for a contempt of this character, it must be clearly made out that the course of justice may really be impeded. In the present case this, in my opinion, has not been done.

106. On this view of the facts of the case, this motion must fail even though the law of contempt is stated in the widest terms applicable to the present case, and I do not think it is necessary to say more on the question of what constitutes a contempt, than that any act which tends to impede the course of justice is a contempt, if there is a well proved probability of such being its result. As this test is not fulfilled in the present case, I do not consider it necessary to enquire in further detail into this part of the question.

107. In conclusion I cannot refrain from saying that though I cannot hold that the conduct of the respondent amounts to a contempt, a very slight alteration in the facts of the case might produce an opposite result. The law on the subject in England is from some points of view ill-defined. In India owing to the course that legislation has followed, it is much more so. What is certain is, in the words of Wilmot C.J., that a Court of Justice without power to vindicate its authority, to enforce obedience to its mandates, or to shield those who are entrusted to its care, is an anomaly that ought not to be permitted to exist in any civilised community: and the Courts will no doubt be anxious to correct any such anomaly, if it exists as far as lies in their power.

108. I concur with the order suggested by the Chief Justice.

Mookerjee, J.

109. The Court is invited upon this application to order that Matilal Ghose, editor and manager, and Taritkanta Biswas, printer and publisher of the Amrita Bazar Patika, a newspaper published in this city, do stand committed to prison for their contempt of Court in respect of the printing and publication, on the 19th, 20th, 21st, 22nd, 24th, 26th and 30th days of May, 1913, of articles which, it is alleged, tend or are calculated to interfere with the due course and administration of justice regarding the pending prosecution of *King-Emperor v. Girindra Mohan Das*[36], and forty-three others in the

[36](1910) ILR 37 Cal 412

Court of the District Magistrate of Barisal. In so far as the alleged editor and manager is concerned, the application has already been refused with costs, on the ground that the affidavits

are wholly insufficient and there are no materials on the record upon which the Court can, on well recognised principles, be invited to take any action: *Queen v. Stanger*[37] *Gobinda Mohan Das v. Kunia Behari Das*[38] No farther reference will consequently be made in so far as the alleged editor and manager is concerned. In respect of the application against the printer and publisher, the case has been elaborately argued on both sides, and the following points emerge for the consideration of the Court, namely, first, is there a proper application upon which the Court can be invited to proceed against the printer and publisher; secondly, if it be assumed that the articles mentioned constitute a contempt of the Court of the Magistrate of Barisal, has this Court jurisdiction to punish the printer and publisher for such contempt; and, thirdly, if this Court has no jurisdiction to punish for contempt of a subordinate Court, do these articles constitute a contempt of this Court, so as to render the printer and publisher liable to be punished for such contempt?

110. In so far as the first of these questions is concerned it is necessary to state that when the application was made on the 6th June last, it was observed by the Court that it purported, on the face of it, to be made by the Superintendent and Remembrancer of Legal Affairs and ex officio Public Prosecutor. The Court declined to entertain the application, till it was stated by the Advocate-General that he moved on behalf of His Excellency the Governor of Bengal in Council. Special leave was thereupon granted to the Advocate-General to serve notice of motion upon the two persons against whom the application was made. Notice was subsequently served, as well upon the alleged editor and manager as upon the printer and publisher. The application, however, it transpired at the hearing, was not amended, and even after special leave had been granted to the Advocate-General to move on behalf of His Excellency the Governor of Bengal in Council, the application stood as if it was made by the Superintendent and Remembrancer of Legal Affair's and the notice of motion ran in the same terms. Under these circumstances, the printer and publisher has urged that there is no proper application before the Court. This contention is, manifestly well founded. It has been argued that the office of Legal Remembrancer, mentioned in Regulation IX of 1793 and formally created by Regulation VIII of 1816 was abolished by Regulation XIII of 1829, and the repeal of the Regulation last mentioned by Act VIII of 1868 did not operate to revive the office as a statutory office. To this argument, no serious answer has been attempted on behalf of the Crown, but it has been stated that by Resolution of Government in 1845, the office was revived and has since then been continued. It has also been stated that the Legal Remembrancer is, by executive order, Judicial Secretary to the Government and ex-officio Public Prosecutor for the Presidency of Bengal. This is obviously immaterial for our present purposes. Leave was explicitly granted to the Advocate-General to move on behalf of His Excellency the Governor in Council, on the faith of the assurance that the application had been authorized by the Governor in Council. The application ought to have been drawn up accordingly and notice of motion served in strict conformity therewith. It is indisputable that this has not been done. The Legal Remembrancer is not shown to be competent to appear and act on behalf of the Crown on the Crown Side of this Court; yet, as transpired at the hearing, no power of attorney had been filed till three

[37](1871) L.R. 6 Q.B. 352
[38](1909) 10 C.L.J. 414
days after leave to serve notice had been obtained from this Court. It would be a mistake to suppose that this is a mere matter of form; it is plainly a matter of vital importance for the party against whom the order is sought, to know the person or persons at whose instance the application is made; if the application is refused, he is entitled to know who is responsible for his costs; if, on the other hand, the application is successful, he is entitled to know who is the respondent in a possible appeal by him. In view of these circumstances, and also in view of the fact that the proceeding is in the nature of a criminal proceeding, the Court is bound to Insist that the application on behalf of the Crown should be made with some approach to regularity and accuracy. The Advocate-General has consequently been constrained, at the close of the arguments which lasted for four days, to apply for leave to amend the petition on behalf of the Crown. In the circumstances of this case, the Court decided to grant leave to amend. This is in conformity with the decision of Chitty J. in *Callow v. Young*[39] In that case, the learned Judge stated that he would be very slow to give leave to amend the notice of motion, if it were in any way likely that by so doing an injustice would be done to any party; he therefore gave leave to amend the notice of motion, but directed the motion to stand over so that notice might be served again: see also *Buist v. Bridge*[40] Since leave to amend was granted, a certificate has been produced from the Chief Secretary to the Government of Bengal to the effect that the application had been authorized by His Excellency the Governor of Bengal in Council and the petition will be amended accordingly by the addition of the Governor in Council as petitioner. The application may consequently be now deemed to be in order.

111. In so far as the second question is concerned, it has been contended on behalf of the printer and publisher that even if it be assumed for a moment, for the pur(SIC) of argument--and for that purpose only--that the articles mentioned constitute a contempt of the Court of the Magistrate of Barisal, yet the High Court has no jurisdiction to punish him for the alleged contempt. This has been controverted on behalf of the Crown, and reliance has been placed upon the decisions in *Surendra Nath Banerjee v. Chief Justice and Judges of the High Court*[41] *Rex v. Davies*[42] and in *In re Venkat Rao* . The question raised is one of great importance and its determination is by no means free from difficulty, the gravity of which has not even been realized by the Advocate-General who appeared on behalf of the Crown. For the solution of the problem, we must turn in the first place to the Indian High Courts Act (24 and 25 Vict. c. 104) and the Letters Patent dated the 14th May, 1862, by which this Court was constituted. Section 9 of the Indian High Courts Act, which defines the jurisdiction and powers of the Indian High Courts, provides as follows:

> Each of the High Courts to be established under this Act shall have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial jurisdiction, original and appellate' and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitation as to the exercise of original, civil, and criminal jurisdiction

beyond the limits of the Presidency towns as may be prescribed thereby; and save as by such Letters Patent may be otherwise

[39](1887) 56 L.J.N.S. Ch. 690
[40](1880) 43 L.T. 432
[41](1883) I.L.R. 10 Calc. 109,
[42][1906] 1 K.B. 32

directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned courts.

112. The Courts which were abolished upon the establishment of this High Court are specified in Section 8, namely, the Supreme Court and the Courts named Sadder Dewani Adawlut and Sadder Nizamut Adawlut at Calcutta. Consequently, the fundamental question which requires examination is,--whether, in a matter of the description now before us, any of the abolished Courts had jurisdiction, power or authority to make the order which this Court is now invited by the Crown to pass. Now, in so far as the Supreme Court of Calcutta is concerned, it is manifest from an examination of Stat. 13 Geo. III c. 63 and the Charter of the 26th March, 1774, by which the Supreme Court was established, that the Supreme Court, if it existed now, would have had no jurisdiction to punish the printer and publisher before us for contempt of a court situated beyond the territorial limits of Calcutta. A Criminal Court at Barisal would in no way be subject to the authority of the Supreme Court as is plain from Clause 21 of the Charter of 1774, and even if it were assumed that the Supreme Court, constituted a Court of Record by Clause 2 of the Charter and invested with the powers of the Court of King's Bench by Clause 4, had inherent authority to punish a contempt of a subordinate Court, it would not follow that the Supreme Court could punish for contempt of a court not subordinate to its authority. In so far as the Court of Sudder Dewani Adawlut of Calcutta is concerned, it was no doubt a Court of Record, and its establishment had been authorized by a statute of Parliament (21 Geo. III c. 7), Section 71). But the Sudder Dewani Adawlut, as its name implies had no jurisdiction in criminal matters, and if the case now before us had happened in 1862, before the abolition of the Sudder Dewani Adawlut. it could not have been suggested with any approach to plausibility that the Sudder Court could have punished a contempt of a Criminal Court at Barisal. Consequently the only other abolished Court whose jurisdiction, power or authority we have to consider is the Sudder Nizamut Adawlut. The history of the establishment and development of the Sudder Nizamut Adawlut has been investigated by authoritative writers, amongst whom may be mentioned Harington (Analysis of Bengal Regulations), Auber (Rise and Progress of the British Power in India), Beaufort (Digest of Criminal Law), Cowell (History and Constitution of Indian Courts) and Field (Introduction to the Bengal Regulations). The details of this history need not be set out here for our present purposes, but it will be found outlined in the first section of Regulation IX of 1793. From an examination of this history, two points appear to be indisputable, namely, first, that the Sudder Nizamut Adawlut was not a. King's Court, but the Company's Court, and, secondly that the Sudder Nizamut Adawlut was not a Court of Record, though it had power of

superintendence over subordinate Criminal Courts (Regulation IX of 1807, Section 24.) Consequently, even if it be assumed for a moment that a Court of Record has power to punish for contempt of a subordinate Court, it is plain that the Sadder Nizamut Adawlut would have had no authority, if the case before us had happened while that Court was still in existence, to punish for contempt of a subordinate Court at Barisal. I have searched in vain for a single instance of the exercise of power by the Sudder Nizamut Adawlut to punish for contempt of a subordinate Criminal Court; the published reports and the constructions issued from time to time, do not furnish any indication that such a power was ever claimed of exercised. On the other hand, statutory provisions completely negative any possible theory that the Sudder Nizamut Adawlut had inherent jurisdiction to punish for contempts of subordinate Criminal Courts Reference may in this connection be made to Section 22 of Regulation III of 1803 which made a provision for punishment of contempt of Court in open Court. An examination of Regulation XII of 1825, which was passed avowedly for the uniform punishment of contempts of Court in any of the Courts of Judicature, Civil or Criminal, and which repealed Section 59 of Regulation IX of 1793 and Section 28 of Regulation VII of 1803, is also instructive in this connection. This Regulation was repealed by Act XVII of 1862. Meanwhile, Act XXX of 1841 had been placed on the statute book, and thereby it was provided that any person using menacing gestures or expression or otherwise obstructing justice in the presence of an officer trying criminal cases or in any superior or inferior Civil or Criminal Court was liable to pay a fine of two hundred rupees, or, in default of payment, to suffer imprisonment for one month. It was further laid down that where no proceedings had been held under this clause in the Court where the offence was committed, any party amenable to the Supreme Court might be indicted as for a misdemeanour. It is significant that on the 3rd February, 1843, the Sudder Nizamut Adawlut issued a Construction (128) by which it was ruled that Act XXX of 1841 was the only law under which contempt of Court could then be punished, as already laid down in Construction 225 of the 17th October, 1842, and that, consequently, prevarication could not be any longer punished as contempt of Court, as it Was not correctly classable as an obstruction to justice under Act XXX of 1841. It is also worthy of note that the Sudder Nizamut Adawlut had previously ruled in Construction 619 of the 21st January, 1831, that under the Regulations as they stood at the time, the only contempt which the Court had authority to punish was contempt committed in open Court. From an examination of the legislative provisions on the subject and of the Constructions issued thereon by the Sudder Nizamut Adawlut, from time to time, it is to my mind plain beyond serious controversy that the Sudder Nizamut Adawlut, when it was abolished, had no jurisdiction to punish for a contempt of a subordinate Criminal Court. On the other hand, there are ample indications that its authority to punish for contempt of itself was of a somewhat restricted character. Consequently, it follows from this review of the status and constitution of the Supreme Court, the Sudder Dewani Adawlut and the Sudder Nizamut Adawlut to punish for contempt of Court, that none of these Courts would have been competent to punish contempt of an inferior Criminal Court at Barisal in the circumstances of the case before us. The conclusion is inevitable that the jurisdiction, power, and authority, which this Court has inherited from the three abolished Courts is of no avail to the Crown.

113. The next question which requires examination is, whether this Court, apart from its inherited jurisdiction, power and authority, is competent tinder the Indian High Courts Act and its Letters Patent, to punish for contempt of a subordinate Criminal Court. Clause 1 of the Letters Patent constitutes the High Court to be a Court of Record, and this was continued by the Letters Patent of 1865. It is plain therefore that in one respect the High Court is in a position different from that occupied by one of the abolished courts, namely, the Sudder Nizamut Adawlut which was, as we have seen, not a Court of Record nor a King's Court. It has been argued in support of the application that the High Court as a Court of Record has inherent authority to punish for a contempt of a subordinate Court which is subject to its superintendence under Section 15 of the Indian High Courts Act, and over which it exercises appellate and revisional jurisdiction under Clauses 27 and 28 of the Letters Patent of 1865, which replace Clauses 26 and 27 of the Letters Patent of 1862. Now, it is indisputable that a Court of Record has authority to punish for contempt. Sir Barnes Peacock, C.J., observed in *In re Abdool and Mahtab*[43] that this Court, by the express terms of the Letters Patent, is a Court of Record, and there can be no doubt that every Court of Record has the power of summarily punishing for contempt. To the same effect, is the observation of Lord Chelmsford in *McDermott v. Judges of British Guiana*[44] See also *Kochappa v. Sachi Devi*[45] This proposition, when applied to cases of contempt of a Court of Record itself, is defended on the ground that the right of every superior Court of Record to punish for contempt of its authority or process must be deemed inherent from the very nature of its organization and essential to its existence and protection and to the due administration of justice. But, obviously, a very different question arises, when it is claimed that a Court of Record has authority to punish for contempt of a subordinate Court which is subject to its superintendence and over which it exercises appellate or revisional jurisdiction. When such a claim is put forward, it becomes necessary to examine whether the principle on which the rule is founded, in so far as contempt of its own authority is concerned, is equally applicable to the case where it is alleged that there has been a contempt of a Court subordinate thereto. Now, what is a Court of Record? Blackstone, in his Commentaries (Book 3, Chap. III, p. 24) states that a Court of Record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the Records of the Court and are of such high and super-eminent authority that their truth is not to be called in question. All Courts of Record are the King's Courts, in right of his Crown and Royal dignity and, therefore, no other Court hath authority to fine or imprison; so that the very erection of a new jurisdiction with the power of fine or imprisonment makes it instantly a Court of Record. With regard to this statement, it may be observed that every Court of Record has not necessarily a power to fine or imprison, and there may be King's Courts which are not of Record. Stephen in his Commentaries (l5th edition, 1908, Vol. 3, page 314) reproduces the statement of Blackstone, but with an important variation, namely, he says that "all Courts of Record are the Courts of the King, in right of his Crown and Royal dignity; and, therefore, no other Court hath authority to fine and imprison for contempt of its authority," and refers in support of this proposition to Hawkins on Pleas of the Crown, Book 2, Chap. 22, Section 1 Bacon's Abridgment Tit. Courts: *R. v. Clement*[46] *R. v. Davison*[47] *R. v. James*[48] *Miller v. Knox*[49]

and *Doe d. Cardigan v. Bywater*[50] It is further pointed out that in some Courts of Record, for example in County Courts, this power to punish for contempt is limited to contempts committed in the face of the Court, as indicated by *Levy v. Moylan*[51] and *Queen v. Lefroy*[52] It is fairly clear therefore that the definition of a Court of Record as given by Blackstone and Stephen does not indicate that a Court of Record, whether so by Parliamentary Statute, by Letters Patent or by prescription, possesses as such, any inherent authority to punish a contempt of a subordinate Court. Is there, then, anything in the reasons assigned in support of the principle that a Court of Record can punish a contempt of its own authority which makes them applicable to a contempt of authority of a subordinate Court? Blackstone in his Commentaries (Vol. IV, page 286) declares that "laws without a competent authority to

[43](1867) 8 W.R. Cr. 32
[44](1868) L.R. 2 P.C. 341
[45](1902) I.L.R. 26 Mad. 494
[46](1821) 4 Barn. & Ald. 218; 23 R.R. 260; 25 R.R. 710
[47](1821) 4 Barn. & Ald. 329; 23 R.R. 295
[48](1822) 5 Barn. & Ald. 894; 24 R.R. 611
[49](1838) 4 Bing. N.C. 574
[50](1849) 7 C.B. 7949
[51](1850) 10 C.B. 189; 84 R.R. 524
[52](1873) L.R. 8 Q.B. 134

secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the Supreme Courts of Justice to suppress such contempt by an immediate attachment of the offender results from the first principle of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly we find it actually exercised as early as the annals of our law extend." To the same effect is the exposition given by Mr. Justice Field in Ex parte Robinson (1873) 19 Wallace 505. "The power to punish for contempt is inherent in all Courts. Its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders, and writs of Courts, and consequently to the due administration of justice." Gray, C.J., observed in similar terms in Cartwright's Case (1873) 114 Mass. 238 that "the summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in Courts of Chancery and other superior Courts, as essential to the execution and to the maintenance of their authority and is part of the law of the land." Harris, J., stated in *Watson v. Williams*[53] that "the power to fine and imprison for contempt, from the earliest history of jurisprudence has been regarded as a necessary incident and attribute of a Court, without which it could no more exist than without a Judge; it is a power inherent in all Courts of Record and co-existing with them by the wise provision of the Common Law." Snyder J. observed in *State v. Frew*[54] that it was "a proposition of law unquestioned and unquestionable that by the Common Law of England, as well as by the uniform decision of the Courts of the United States, Courts have the inherent power to punish contempt in a summary manner, and that this power is an essential element and part of the Court itself, which cannot be taken away without impairing the usefulness of the Courts, because it is a power necessary to the exercise of all others." Marshall J. observed in *State v. Shepherd*[55] that if the Court did not possess the power to punish contempts committed against itself, the jury and its officers, summarily, it would be easy for a contemner to escape punishment entirely, for if the matter was sent to another Court or left to be tried by a Jury, the contemner could so insult and abuse such other Court or the Jury as to render it impossible for them also to try him also, and by thus renewing his offence to every Court he was called before, make it impossible to punish him at all. It is plain that the reasons thus assigned do not indicate that a Court of Record has inherent power to punish for contempt of

an inferior Court over which it exercises a power of superintendence and which is subject to its appellate and revisional jurisdiction. On the other hand, it is a fundamental rule that ordinarily one Court cannot punish a contempt against another Court or Judge, and this principle is based on the doctrine that the offence is substantially criminal and the power to punish it is vested alone in the Court whose judicial authority is challenged: Ex parts Bradley (1868) 7 Wallace 364, Ex-parte Tilling Hast (1830) 4 Peter 108, *Callan v. McDaniel*[56] *Tindall v. Westcott*[57] *Atkinson Railway Co. v. Gennison*[58], *Voorhees v. Albright*[59] The position, however, is obviously different where the contempt is against subordinate officers of the Court; such a contempt is rightly regarded as contempt of the authority of the Court by which the officer was appointed, and may be punished on well-recognised principles. There is consequently no foundation laid by the Crown for the theory that this Court as a Court of Record has authority to punish for contempt of the Court of the Magistrate of Barisal merely because this Court is a Court of Record which exercises

[53](1850) 36 Mrs. 341
[54](1884) 24 W. Va. 416; 49 Am. Rep. 257
[55](1903) 177 Mo. 205; 99 Am. St. Rep. 624; 76 S.W. 79
[56](1882) 72 Alabama 96
[57](1900) 113 Geo. 114; 15 L.R.A. 225
[58](1886) 60 Mich. 232; 27 N.W. 6, In re Williamson (1855) 26 Pa. St 9; 67 Am. Deo. 374
[59](1879) 28 Fd. Cas. 16999

power of superintendence over that Court or because that Court is subject to its appellate and revisional jurisdiction. The hypothes i s that a superior Court which exercises a power of superintendence over a subordinate Court possesses by implication a power to afford to such Court protection against contempts of its authority is no doubt attractive, but has no solid foundation in the history of the constitution of our Courts. The Advocate-General has, however, strongly relied upon three cases. The first of these, *Surendra Nath Banerjee v. Chief Justice of Bengal*[60] is of no assistance. In that case, the contempt was of the authority of this Court in the exercise of Its original civil jurisdiction; there is no room for controversy that this Court had ample authority to punish contempt of that description. The second case upon which reliance is placed is the decision in *In re Venkat Rao* . With all respect for the learned Judges who decided that case, I am unable to agree in their view that the High Court possesses the inherent common law powers in connection with matters of contempt which were exercised formerly by the Court of King's Bench and now by the King's Bench Division. In support of this comprehensive proposition, they rely upon the decision of the Judicial Committee in *Surendra Nath Banerjee v. Chief Justice of Bengal*[61] But, as already explained, in the latter case, the contempt had been committed in relation to the High Court in the exercise of its original civil jurisdiction. Now, it cannot be questioned that the High Court in so far as it has inherited the jurisdiction, power and authority of the abolished Supreme Court can exercise all the powers which might have been exercised by the Supreme Court, and consequently the powers exercisable by the Court of King's Bench, although, even upon this matter, there may be room for controversy, whether in so far as contempts of proceedings are concerned, the more recent development of the law in England is applicable in this country, in view of the provisions of Clause 21 of the Chatter of 1774 which may indicate that the growth of the law on this subject has been arrested. That is a question of some nicety, however, upon which I reserve my opinion; but it is plain that the proposition that

the High Court in so far as it has inherited the jurisdiction of the abolished Supreme Court possesses inherent common law powers in connection with matters of contempt which were exercised by the Court of King's Bench, is of no assistance in the solution of the problem now before us, namely whether the High Court as a Court of Record can punish for contempt of a subordinate Court over which it exercises powers of superintendence and which is subject to its appellate and revisional jurisdiction. The fundamental distinction between the two questions is easily realized from an examination of the decision in *Rex v. Davies*[62] upon which the Advocate-General relies as the learned Judges of the Madras High Court did in *In re Venkat Rao* . The decision in *Rex v. Davies*[63] is based on the ground that the King's Bench Division has power to punish by attachment contempts of inferior Courts. This conclusion is not based on the ground that the King's Bench Division possesses this power merely because it is a Court of Record, or, because it exercises powers of superintendence over inferior Courts. The decision is based, as is clear from the judgment, as also from the judgment in the earlier case of *Rex v. Parke*[64] that the decision is founded on a historical consideration of the supreme place in the judicature assigned to the Court of King's Bench, which according to Lord Coke had power to correct errors and misdemeanours extra-judicial tending to the breach of the peace or oppression of the subjects or any other manner of misgovernment," and according to Hawkins had power to "deal with every kind of misdemeanour including those which are properly the subject of indictment or criminal information as well as

[60](1883) I.L.R. 10 Calc. 109 [62][1906] 1 K.B. 32 [64][1903] 2 K.B. 432

[61](1883) P.L.R. 10 Calc. 109 [63][1906] 1 K.B. 32

those which are punishable summarily by attachment." To use the language of Mr. Justice Wills, the authorities quoted by him serve to show the very great trust reposed in the Court of King's Bench in respect of its control and superintendence of all inferior Courts and that it is in a special manner the guardian and protector of public justice throughout the kingdom. It is obvious that these considerations of a very special character have no application to this Court, and if we were to apply the principle which lies at the foundation of the decision in *Rex v. Davies*[65] we would have to hold that the Common Law of England is applicable throughout the jurisdiction of this Court, even to persons other than British subjects beyond what was the territorial limit of the ordinary jurisdiction of the abolished Supreme Court. Such a view would be clearly erroneous and in direct contravention of the express provision of the Letters Patent whereby this Court was constituted. It is further worthy of note that even in England the decision in *Rex v. Davies*[66] has met with adverse comment, as it was unquestionably an extension of what had been up to that time generally regarded as the limits of the law on the subject: *R. v. Berchett*[67] In the matter of an application for an attachment for contempt of Court (1886) 2 T.L.R. 351. A similar view has been taken in the Courts of the United States. There it has been held that a superior Court cannot punish for contempt of an inferior Court: *Penn v. Messinger*[68] *In re Emery*[69] Similarly it has been held that although every superior Court possesses an inherent power of employing contempt proceedings to prevent any interference with its administration of justice, Ex parte Fernandez (1861) 10 C.B.N.S. 3, Ex parts Terry (1888) 128 U.S. 289, this power can be exercised only by the superior Court whose authority is being defied: *Androscoggin v. Androscoggin*[70] *People v. Placer County Judge*[71] I am not unmindful that in Victoria it was recently held in *In re Packer*[72]

that where a newspaper has published statements tending to prove that a person accused of murder and remanded to appear before a lower Court was guilty, the Supreme Court had jurisdiction. to punish the members of the staff of the paper for contempt. This decision, however, like the decisions in *Rex v. Davies*[73] and *Rex v. Clarke*[74] has met with weighty adverse comment (25 Harvard L.R. 561) where it is pointed out that although the summary contempt process is allowed on the theory that otherwise the Court would be prevented from the exercise of its proper function, *United States v. Hudson*[75] Cartwright's Case (1873) 114 Mass. 230, 238 the recent authorities by which the law has been extended proceed on the ground that where a subordinanate Court is powerless to prevent an interference with its ad administration of justice, the superior Court should intervene by an attachment for contempt. It is also very significant that when the case of *In re Packer*[76] was taken by way of appeal by special leave to the High Court of the *Commonwealth of Australia, Packer v. Peacock*[77] the order of the Supreme Court was supported on the ground that the publication in question constituted a contempt of the Supreme Court itself, although the publication was made while the matter was still before the Justices. It was ruled that where a person has been arrested and charged on information with an offence in respect of which Justices may commit him for trial in the Supreme Court, the publication after his arrest and before he has been so committed, of matter tending to prejudice his fair trial in the Supreme Court is a contempt of the Supreme Court which that court has jurisdiction to punish. It is worthy of note that even this conclusion was reached with considerable hesitation and

[65][1906] 1 K.B. 32
[66](1906) [1906] 1 K.B. 32
[67](1722) 1 Strange 567; 93 E.R. 704
[68](1791) 1 Yeates (Pa.) 2
[69](1907) 149 Mich. 383; 112 N.W. 951
[70](1862) 49 Maine 392
[71](1865) 27 California151
[72](1911) V.L.R. 401
[73][1906] 1 K.B. 32
[74](1910) 103 L.T. 636
[75](1812) 7 Cranch.32, 34
[76](1911) V.L.R. 401
[77](1912) 13 Com. L.R. 577

reluctance, though the Supreme Court of Victoria has and always has had the same jurisdiction as the Court of King's Bench had in England at Common Law. It must farther be observed that the charge was of murder, which in Victoria is only triable before the Supreme Court, so that the procedure prescribed by law for bringing the accused to trial might be deemed, in principle, a continuous process beginning with the arrest and ending with the conviction or acquittal, so that the intermediate proceedings were in substance stages in this single process.

114. It may further be urged against the extension of the doctrine that a proceeding in contempt of the description now before this Court, is really in the nature of a criminal proceeding *In re Pollard*[78], and the court must hesitate to create a new crime. The distinction between criminal and civil contempt is of a fundamental character, though it has been sometimes overlooked. A criminal contempt is conduct that is directed against the dignity and authority of the Court. A civil contempt is failure to do something ordered to be done by a court in a civil action for the benefit of the opposing party therein. Consequently, in the case of a civil contempt the proceeding for its punishment is at the instance of the party interested and is civil in its character; in the case of a criminal contempt, the proceeding is for punishment of an act committed against the majesty of the law, and as the primary purpose of the punishment is the vindication of the public authority, the proceedings conform as nearly as possible to proceedings in criminal cases.

It is conceivable that the dividing line between the acts constituting criminal and those constituting civil contempts may become indistinct in those cases where the two gradually merge into each other. But, in ordinary cases the line of demarcation is not difficult to determine: *Scott v. Scott* [79]Reference may in this connection be made to the judgment of Lord Hardwicke in the case of *In re St. James Evening Post*[80] where the Lord Chancellor observed as follows: "There are three different sorts of contempt. One kind of contempt is, scandalizing the Court itself. There may be likewise a contempt of this Court, in abusing parties who are concerned in causes here. There may be also a contempt of this Court, in prejudicing mankind against persons before the cause is heard. There cannot be anything of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety, both to themselves and their characters." It is worthy of note that the first kind of contempt mentioned by Lord Hardwicke is a matter wherein the State is vitally interested; it is obviously a criminal contempt. The other two kinds of contempt spoken of are such as directly affect a party litigant, and at the same time affect the State in so far as it is of importance "to keep the streams of justice clear and pure." See also *Charlton's Case*[81] *In re Wallace*[82] *People v. Oyer and Terminer Court*[83] *State v. Knight*[84] The distinction between a civil and criminal contempt is explained by Mathew, J. in *In re Davies*[85] and is also clear from Onslow's, Case (1873) L.R. 9 Q.B. 219 and Skipworth's Case (1873) L.R. 9 Q.B. 230. In my opinion, it is plain beyond controversy that if the contempt alleged in this case be established, it is a criminal contempt: *Reg. v. Gray*[86] *American Exchange v. Gillig*[87] *Rex v. Davies*[88] *McLeod v. St. Aubyn*[89] Consequently what the Court is invited by the Advocate-General to do is to create a new crime, because, as has been conclusively established, at the time when this Court was constituted none of the

[78](1868) L.R. 2 P.C. 106; 5 Moo. P.C.N.S. 110; 16 E.R. 457
[79][1913] A.C. 417
[80](1742) 2 Atk. 469; 26 E.R. 633
[81](1837) 2 My. & Cr. 31640 E.R. 661, Macgill's Case (1748) 2 Fowl. 404
[82](1866) L.R. 1 P.C. 283
[83](1886) 101 N.Y. 245; 54 Am. Rep. 691
[84](1893) 3 S.D. 509; 44 Am. St. Rep. 809
[85](1888) 21 Q.B.D. 236
[86][1900] 2 Q.B. 36
[87](1889) 58 L.J. Ch. 706
[88][1906] 1 K.B. 32
[89][1899] A.C. 549

three abolished Courts had, notwithstanding the Preamble to the Indian Penal Code, jurisdiction to punish for the criminal contempt alleged in the case before us. If a contempt of this character is to be treated as a crime, and it is to be made summarily punishable *Queen v. Lefroy*[90] *Queen v. Judge of the Brompton County Court and Vague*[91] the question is obviously a matter for the consideration of the Legislature and beyond the decision of the Court. On these grounds, I feel convinced that this Court, though it is a Court of Record and though it exercises powers of superintendence over the Court of the Magistrate at Barisal and though that Court is subject to the appellate and revisional jurisdiction of this Court, has no power to punish for contempt of the Court of the Magistrate at Barisal.

115. As the second question has been answered in the negative, the third question now requires consideration, namely, do these articles constitute a contempt of this Court, so as to render the printer and publisher liable to punishment for such contempt? This aspect of the matter was not developed, possibly not even appreciated, on behalf of the Crown, but it merits examination, as it

is the only possible ground upon which the present application may be supported with any semblance of plausibility. Before I proceed to consider the articles, it is necessary however to premise that conduct which amounts to contempt of a subordinate Court does not necessarily amount to contempt of a superior Court. It is not essential for the present purpose to specify exhaustively the various acts which may constitute contempt. Blackstone in a celebrated passage of his Commentaries (Vol. IV, page 285) specifies some of them: "Some of these contempts may arise in the face of the Court as by rude and contumelious behavior, by obstinacy, perverseness or prevarication, by breach of the peace or any willful disturbance whatever, others in the absence of the party, as by disobeying or treating with disrespect the King's writ or the rules or process of the Court; by perverting such writ or process to the purposes of private malice, extortion or injustice; by speaking or writing contemptuously of the Court or Judges, acting in their judicial capacity, by printing false accounts or even true ones, without proper permission, of causes then depending in judgment; and by anything in short that demonstrates a gross want of that regard and respect which, when once Courts of Justice are deprived of their authority so necessary for the good order of the Kingdom, is entirely lost amongst the people". It may be added that there might be a contempt of Court by tampering with evidence and witnesses or suppressing testimony, or, as is put in Skipworth's Case (1873) L.R. 9 Q.B. 230, 232 if witnesses are attacked, frightened, or deterred. Contempt may also be committed by publications concerning a pending cause, trial or judicial investigation, calculated to prejudice or prevent fair and impartial action, which seek to influence judicial action by threats or other form of intimidation, which reflect upon the Court, counsel, parties, or witnesses respecting the cause, which are calculated to threaten or intimidate witnesses or which tend in any manner to corrupt or embarrass in any manner the due administration of justice: *Daw v. Eley*[92] *Skipworth's Case*[93] *R. v. Clement*[94] *Littler v. Thomson*[95] *Reg. v. Order Dogherty*[96] *Tichborne v. Tichborne*[97] *Kitcat v. Sharp*[98] *Hunt v. Clarke*[99] In the case before us, the only imaginable ground on which it can be argued that the articles in question constitute a contempt of this

[90](1873) L.R. 8 Q.B. 134
[91][1893] 2 Q.B. 195, 200
[92](1868) L.R. 7 Eq. 49, In re Crown Bank (1890) 44 Ch. D. 649
[93](1873) L.R. 9 Q.B. 230, 232
[94](1821) 4 Barn. & Ald. 218; 23 R.R. 260; 25 R.R. 710
[95](1839) 2 Beav. 129; 48 E.R. 1129
[96](1348) 5 Cox. C.C. 348
[97](1870) 39 L.J. Ch. 398
[98](1882) 52 L.J. Ch. 134
[99](1889) 58 L.J.Q.B. 490

Court is that witnesses might be kept back, with the possible result that there might not be a fair trial, and that if the matter should be hereafter brought up to this Court, this Court might be hampered in the due administration of justice. Let it be assumed for the purpose of argument and for that purpose alone that there may be a contempt of this Court under circumstances like these, that is, by publication of an improper character made long before the proceedings have been brought to this Court. The question arises, do the articles to which exception is taken, fall within this category. The Advocate-General minutely criticised the language used in these articles; in fact the analysis was so close and the criticism so severe that they considerably diminished the weight which the Court would otherwise be inclined to attach to an argument on behalf of the Crown in a proceeding of a criminal nature. The obvious course to pursue in cases of this description is to read the articles as they stand and to attach to the words used their natural

meaning without the assistance of a laborious commentary.

116. Tested from this point of view, how do these articles stand? In the first place, they comment upon the method of house searches and the annoyance and Hardships they cause in many instances to innocent persons. In the second place, they comment upon the mode of arrest of suspected persons, sometimes in what may not inappropriately be called an almost dramatic manner. In the third place, these articles comment upon the employment of Gurkha soldiers, which it is asserted is wholly unnecessary for purposes of judicial investigation of the alleged crime. In the fourth place, the articles comment upon the mode of treatment of the persons arrested, and it is suggested that those against whom there is no direct evidence should not be treated with needless severity and harshness. If we do not allow ourselves to be embarrassed by ingenious comments, we can hold without difficulty that positive evidence here means direct evidence as opposed to circumstantial evidence, in other words, the evidence of an eyewitness. In substance, the articles assert that persons who have not been proved to be guilty or persons against whom there is no direct evidence should be deemed innocent and treated as such. In the fifth place, these articles express the opinion that the accused ought not to be tried by a Special Magistrate but by this Court. This comment is futile, because the accused cannot under the law be tried by a Special Magistrate; the investigation may be made by a Magistrate, but the trial must take place before the Court of Session. On the other hand, the case cannot be tried by this Court, unless the statutory conditions formulated in the Indian Criminal Law Amendment Act, 1908, have been fulfilled, namely, that there has been a determinate on by the Government that the conditions under which such mode of trial is permissible, exist in the present instance, that is, such trial is needed in the interests of peace and good order. This determination, as has been repeatedly pointed out, is not a matter of form, but of substance, a matter of judgment founded upon the materials on which the prosecution is intended to be based. In the sixth place, these articles express the desire that such amongst the accused as are guilty should be punished, but such as are innocent should be acquitted on a fair trial. In the seventh place, these articles implore His Excellency the Governor to examine the matter for himself and to determine whether the material before him justifies the initiation and continuance of the proceedings. In the eighth place, these articles do undoubtedly insinuate in places that the preliminary investigation by the police has been carried on in an objectionable manner. An insinuation of this description may merit strong disapprobation, and it is unfair to the investigating officers, inasmuch as the vagueness and generality of the charge makes it impossible for any individual member to repudiate the charge or to defend his character. But I am unable to accept the contention that an allegation of this character constitutes a contempt of Court. I must emphatically repudiate the astonishing proposition that the Criminal Investigation Department is the prosecutor in the criminal case before the Court of the Magistrate at Barisal, and that consequently imputations, veiled or otherwise, to the effect that the investigation by the department has been carried on in an objectionable manner constitute a contempt of Court. I must assume that the prosecution has been instituted by and with the sanction of the Governor in Council, and that whatever share the Criminal Investigation Department may have in the investigation of the case, they cannot be

deemed. in law, and I trust they are also not in fact, the prosecutors in the criminal case. The statement that the Criminal Investigation Department is really the prosecutor in the criminal case, taken along with the circumstance that the articles make, insinuations as to the mode of investigation by that Department may, no doubt, explain the origin of the application made to this Court to commit the printer and publisher for contempt. But it plainly does not establish that the articles do constitute a contempt of the Court of the Magistrate of Barisal, much less of this Court. The Advocate-General has strenuously contended that the articles in question are of an extremely reprehensible character and that in fact it is difficult to imagine any comment on a pending cause more worthy of the strongest condemnation. It must be remembered, however, that we cannot consider these articles except for the determination of one question and one question alone, namely, whether they constitute contempt of this Court; we cannot fairly be invited to express an opinion upon a matter not before the Court, a matter, in fact, which has not been even argued; but I desire to observe that these articles do not constitute an attack on the Local Government, though there has been a tendency in the course of the argument addressed to us on behalf of the Crown to identify the Criminal Investigation Department with the Local Government. A plain reading of the articles amply justifies the View that the writer had no motive or intention to embarrass the Government. In my opinion, these articles plainly do not constitute a contempt of this Court, however much one may regret that comments should be published upon a case under judicial investigation: Skipworth's Case (1873) L.R. 9 Q.B. 230, 232.

117. After an anxious consideration of the articles and of the arguments addressed to us on behalf of the Crown by the Advocate-General, my deliberate conclusion is that the application is entirely misconceived and no order for attachment should be made. In my opinion, the application must be refused with costs.

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