

(1877) 03 CAL CK 0003
In the Calcutta High Court

In Re: Empress of India on the Prosecution of Malcolm

Date of Decision : 22-03-1877

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 147

Citation : (1877) ILR (Cal) 278

Hon'ble Judges : White, J

Bench : Single Bench

Judgement

White, J.—I have, in the course of the argument, stated my views so fully that it is unnecessary to do more than recapitulate the reasons for my decision.

2. Mr. Phillips, on behalf of the prosecution, applies, on affidavit, for one of two orders--either for a rule u/s 147 of the High Courts' Criminal Procedure Act (X of 1875), calling on the Magistrate to show cause why these proceedings should not be transferred to this Court for hearing and final determination; or for a mandamus to compel the Magistrate to commit on a charge of being a member of an unlawful assembly u/s 141 of the Penal Code.

3. When the case came before me on the first occasion, I was informed that the Police Magistrate, having heard the evidence, did not disbelieve the facts proved, but thought that they did not amount to the offence with which the defendants were charged, and, therefore, declined to commit them for trial. When I heard that such was the nature of the case, I requested Mr. Phillips to refer me to some authority for my granting his application. He has not brought before me, however, any authority which shows that either the Court of Queen's Bench, or this Court, has ever issued a mandamus, or granted a certiorari, in a case similar to the present one. He has, indeed, referred me to two cases, *The Queen v. Adamson* 1 Q.B.D. 201 and *The King v. The Justices of Kent* 14 East 395 in which the Court of Queen's Bench granted a writ; in the first case, ordering the Justices to hear and determine a case which they had refused to hear; and in the second case, ordering them to issue a summons, which they had refused to issue. But both these cases, when examined, show that the Court of Queen's Bench does not issue a mandamus in such cases unless the inferior Court has

actually declined jurisdiction, or has acted under circumstances which amount practically to declining jurisdiction. Now in this case the Magistrate has not declined to exercise jurisdiction. He has heard the evidence in the case, and has come to the conclusion that no offence under the Penal Code has been committed. He has, in fact, exercised his jurisdiction, and decided the case in favour of the defendants. This is sufficient to dispose of the first branch of Mr. Phillips' application. Quite irrespective, however, of this, I may state that a mandamus could not issue in the form asked for; if it issued at all, it would go not to order the Magistrate to commit, but to order him to hear the case again, and upon a sufficient case being made out, then to commit.

4. As to the second branch of the application, which is to transfer the case to this Court u/s 147 of Act X of 1875, I think I am equally without power to deal with the case in the way I am asked to do. That section provides, that "whenever it appears to the High Court that the direction hereinafter mentioned will promote the ends of justice, it may direct the transfer to itself of any particular case, and shall have power to determine the case so transferred, and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form, but on the merits only. "The present case is not, I think, within the purview of the section. If I transferred it, I should be doing so not for the purpose of quashing or affirming a conviction or other proceeding, but for the purpose of hearing the case, taking the evidence of the witnesses, and myself determining whether a case for committal had been made out or not. I think the section is not wide enough to enable me to do that, and I should be extending the section beyond the intention of the Legislature if I put it in force to transfer such a case as this.

5. I can well imagine that the refusal of a Magistrate to commit may now and then result in a grievous failure of justice, but if the Legislature intended to provide for such a case, the Court should have been specifically armed with power to deal with such case. I cannot infer such a power in the absence of express words. I am, therefore, unable to grant this application. I have assumed throughout these remarks that an error of law has been committed, but I have made that assumption only for the purposes of the argument. Considering the law bearing on the application to be such as I have stated, I have thought it unnecessary to hear the affidavit. The refusal to commit is not tantamount to an acquittal, and the prosecution can, if they choose, go before the Magistrate again, though I am by no means saying they ought to do so. The application must be refused see *Corporation of Calcutta v. Bheecunram Napit*, post.