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1. *Bugga and others Versus The King Emperor*

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Bugga and others Versus The King Emperor (1920) 2 MLJ 1

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PRIVY COUNCIL
Judges: Viscount Cave. Lord Moulton, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins, *XJ.*
16th February, 1920..

Headnotes

Martial Law — *State* Trials-Martial Law Ordinance If IV of 1919 not confined to persons taken in the act of commuting an offence specified in *Regulation* X of *1804*, restrictions on the powers of the Indian Legislature-right to be tried by the ordinary-Courts — Wither the Indian Legislature has power to take it away Laws affecting allegiance "Repugnancy" between Indian Statutes and Acts of Parliament — How far it invalidates the Indian Statute — Government of India Act, 1915 (5 and 6 Geo. V. c. 61) ss. 65 (2) and (3), 12 — Government of India (Amendment) Act; 1916 (6 and 7 Geo. V. c. 37) s. 2(2).

The Martial Law (Further Extension) Ordinance, 1919, (Ordinance No. IV of 1919) is not confined in its application to persons taken in the act of committing one of the ***offences*** specified in ***Regulation*** X of ***1804***, or to the persons and ***offences*** described in Martial Law Ordinance I of 1919, but extends to all ***offences*** committed on or after March 30, 1919.

S. 65 sub section (2) of the Government of India Act, 1915, does not prevent the Indian Government from passing a law which may modify or affect a rule of the constitution or of the Common Law upon the observance of which some person may conceive or allege that his allegiance depends: it refers only to laws which directly affect the allegiance of the subject, as by a transfer or qualification of the allegiance or a modification of the obligation thereby imposed.

It was argued that Ordinance IV of 1919 contravenes section 65(8) of the Government of India Act, 1915, which prevents the Indian Government from empowering any Court other than a High Court to sentence to death any of His Majesty's subjects born in Europe: the ordinance containing no exception in favour of such subjects:

Held, that the ordinance may properly be described as repugnant to the Act so far as British born subjects are concerned, but that it is void only to the extent of that repugnancy, *i.e.* in the case of His Majesty's subjects born in Europe.

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Appeal by special leave from a judgment of a Commission appointed under the Martial Law Ordinances of 1919 and sitting at Lahore.

All material facts of the case are set out in their Lordships' judgment, which reproduces the Ordiance under consideration The sole question on this appeal was as to the jurisdiction of the Tribunal *i. e.* whether it was competent to try the appellants for the ***offences*** of which they were convicted.

Sir John Simon K.C, Sir Reginald, Auckland, K.C., Dube and R.M. Palat for Appellants.

The Attorney-General, the Solicitor-General, Sir Erle Richards K.C. and Kenworthy Brown for Respondents.

Sir John Simon for the appellants'-The Commission had no power to try appellants. None of them were taken in the act, or till after April 12, 1919. There may have been a very proper case for investigation, but Ordinance IV of 1919 did not apply. Ordinance I for 1919 was passed with retrospective effect under date April 14, 1919. An order of the Governor-General in Council of the 13th April, proclaiming martial law, had suspended the function of the ordinary Criminal Courts in the cases of persons taken in the act committing the ***offences*** enumerated in the ***Bengal State Offences Regulation***, ***1804***, which had been extended to the Punjab by Act IV of 1872: it provided that such persons were to be tried by Courts martial. Next day Ordinance I of 1919 was passed. The present accused were

not persons covered by that Ordinance, nor do the ***offences*** charged against them fall within it. But after they had been arrested Ordinance IV of 1919 was enacted, and the question is what is meant by the words "any offence' in that Ordinance. There are two views possible. The narrower, and as we submit the correct construction, is that the ordinance merely puts back the date of Ordinance I from April 13 to March 30. The virtue of this construction is the Ordinance would be valid.

(Sir *Lawrence Jenkins* referred to the preamble, "***offences*** other than those specified".)

The wider construction is that (subject of course to general or special orders of the Local Government), the Commission may try any person for any offence: as was put by a member of the Board when leave to appeal was granted they might try a small boy for stealing apples. If this be the true construction we submit that the ordinance is completely ultra vires: that it is an invalid piece of subordinate legislation. The legislative powers of the Government of India are derived

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from S. 65 of the Government of India Act 1915, and are subject to the limitations imposed by that section. Subordinate legislation is bad *in toto* if by its terms it exceeds its authority. Comyns, in his Digest, under "By-law" says (Chapter 7) ''a By-law, void in part, is void for the whole": also, that "a By-law, being intire if it be unreasonable in any Particulars shall be void for the whole". The test is whether the legislation as a whole is good, subject to this, that if there is a separable part which is good, it may stand: *King v. The Company of Fishermen of Faversham,*[1]

Here the Legislature have purported, contrary to S. 65(3) of the Government of India Act, 1915, to empower a new Court to sentence people to death.

(Lord Moulton): Does not that exception refer only to European British subjects ?)

(The Attorney General. -Referred to the Government of India Amending Act, 1916, S. 2.)

The provisions as to the validity of Indian laws are contained in S. 84: this section 2 of the later Act adds some words at the end of S. 84. I submit they do not apply: this is a question of legislative power: you have two conflicting powers: I submit the Ordinance is not repugnant to the Act, but simply waste paper-invalid. S. 52 of the Act of 1916 has no greater force than the corresponding provisions of the Colonial Laws Validity Act, 1865 (Ss. 2, 3) it was enacted only because the Colonial Laws Act did not apply to India.

Further the whole ordinance was invalid because it conflicted with S. 65(2) of the Government of India Act, 1915. The Governor General of India in Council was not competent to alter the constitution at law on which the allegiance of the subject depends. It was difficult to conceive of anything more fundamental than that the person charged with an offence should have the opportunity of being tried by the ordinary course of law: the principle was recognised as far back as Magna Charta. This was not the case of people taken in open rebellion and tried during such rebellion: they were arrested as well as tried when the ***state*** of rebellion was over and the ordinary courts of law were sitting, and the Governor General in Council was not competent to deprive them of their constitutional right to be tried by those Courts.

Sir Reginald Auckland K. C, followed.

The Attorney General (Sir Gordon Hewart) -for respondent: The Commission had power to try the accused for the ***offences*** with which they were charged. Ordinance IV of 1919 enacted that such a

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Commission should have jurisdiction to try any person for any offence committed after March 30, 1919: there was nothing in it to limit it to the classes of ***offences*** which fall under the earlier Ordinance. The preamble, with the words ''***offences*** other than those specified", is inconsistent with any such limitation. Ordinance IV of 1919 may be void in the case of European British subjects, but that does not make it void in the case of others with regard to whom there is no repugnancy: this is the very case which S. 2 of the Amending Act was designed to meet. The Commission were acting within their jurisdiction and there was ample evidence to support their findings.

CASES REFERRED TO:

IN RE. Ameer Khan (1920) 2 MLJ. 1 ; (1870) 6 Ben.L.R. 892 and 459

Sir Erle Richards,K. C., followed.

Sir John SimonK. C., replied.

Their Lordships' judgment was delivered (February 20, 1920., by.

Viscount Cave.-This is an appeal by special leave from a judgment, dated the 2nd June, 1919, of a Commission appointed under the Martial Law Ordinances of 1919 and sitting at Lahore. By that judgment twenty of the twenty-one appellants were convicted of ***offences*** under S. 121 of the Indian Penal Code, that is to say, of waging or attempting to wage war against the King or abetting the waging of such war, and were sentenced to death and forfeiture of property; but it is understood that as to some of them the death sentence has since been commuted. The remaining appellant, Ghulam Hassan, son of Makham, was convicted of an offence under 'S. 412 of the same Code, that is to say, of receiving stolen property from dacoits, and was sentenced to rigorous imprisonment for seven years. The question raised on the appeal is as to the competency of the Commission to try the appellants for those ***offences***.

The facts may be ***stated*** as follows: At the end of March and during the first days of April, 1919, there was serious unrest in certain parts of the province of the Punjab, and this unrest culminated on the ***10th*** April in the outbreak of open rebellion at Amritsar in that province and elsewhere, and the ***offences*** of which the appellants have been found guilty were committed at Amritsar on that date. The occurrences of the ***10th*** April are ***stated*** in the judgment of the Commissioners as follows:

"On April ***10th***, 1913, about noon, after the arrest of Kitchlew and Satyapal, dis order broke out in Amritsar, in the course of which an attempt was made to

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invade the Civil Station by a mob which had to be turned back by fire from troops and police. Shortly after this a mob attacked the National Bank situated in the City, Brutally murdered Mr. Stewart, manager, and Mr. Scott, assistant manager, sacked and burnt the batik, and looted the godown, which contained cloth and other goods to the value of several lakhs of rupees. The Chartered and Alliance Banks were subsequently sacked. A Mission Hall, Church and the Religions Book Society's Depot were also attacked and burnt by the mob. There was no reason why these institutions should have been singled out by the mob or their leaders except that, as the evidence shows, they were out to destroy the visible manifestations of British connection with the country."

It was proved that the appellants, with the possible exception of Ghulam Hassan, were members of the mob and took an active part in the attack on the National Bank, and there was evidence that some of them took part in the. actual murder of the manager and assistant manager. Bugga and Rattan Chand appear to have been the ringleaders. Ghulam Hassan was found in possession of property looted from the Bank. Bugga was arrested on the 12th April and the other appellants on subsequent dates. None of them were taken in arms or in the act of committing the ***offences*** with which they were charged.

On the 13th April the Governor-General in Council, acting under the ***Bengal State Offences Regulation*** No. X of ***1804*** (which was extended to the Punjab by the Punjab Laws Act 1872) made an order whereby, after reciting that he was satisfied that a ***state*** of open rebellion against the authority of the Government existed in the districts of Lahore and Amritsar he suspended the functions of the ordinary Criminal Courts within those districts as regards the trial of persons of the classes referred to in the ***Regulation*** taken in arms in open hostilty to the British Government or in the act of opposing by force of arms the authority of the same, or in the actual commission of any overt act of rebellion against the ***State***, or in the act of openly aiding and abetting the enemies of the British Government within those districts, and established Martial Law within those districts; and by the same order he directed the immediate trial by Courts-Martial of all such persons. similar orders were subsequently made in respect of the districts of Gujranwala and Gujrat.

On the 14th April the Governor General, acting under S. 72 of the Government of India Act, 1915, made and promulgate

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the Martial Law Ordinance No. 1 of 1919, whereby it was provided that every trial in the districts of Lahore and Amritsar held under the ***Bengal State Offences Regulation***, ***1804***, should, instead of being held by a Court-Martial, be held by a Commission consisting of three persons appointed in this behalf by the Local Government. It was provided that at least two members of every such Commission should be persons who had served as Sessions Judges or had such other legal qualification as therein mentioned. It was also provided that a Commission should have the powers of a general Cdurt-Martial under the Indian Army Act, 1911, and should follow so far as might be the procedure prescribed by that Act, but power was reserved to the Local Government to direct that the Commission should follow the procedure of a summary general Court-Martial, the finding and sentence of a Commission not to be subject to confirmation by the military authorities. Section 7 of the Ordinance was as follows:

"Save as provided by Section 6, the provisions of this Ordinance shall apply to all persons referred to in the said ***Regulation*** who are charged with any of the ***offences*** therein described, committed on or after the 18th April, 1919".

By subsequent Ordinances the provisions of the abovementioned Ordinance No. 1 of 1919, were extended to Gujranwala and Gujrat, and power was given to impose a minor punishment in lieu of the death sentence.

In pursuance of the above-mentioned Ordinance No. 1 of 1919, the Local Government of the Punjab duly appointed a Commission, consisting of Lieut.-Colonel A. A. Irvine, C. I. E., District and Sessions Judge; F.W. Kennaway, Esq., I. C. S., District and Sessions Judge; and 1. C. Lall, Esq.

From the above statement it is clear that the appellants could not, if no further step had been taken, have been brought before the Commission for trial. They had not been taken in the act of committing any of the offence referred to in ***Regulation*** X of ***1804***, and the ***offences*** with which they were charged were committed before the 13th April, 1919, the date mentioned in S. 7 of the Ordinance. But on the 21st April, 1919, the Governor-General, acting under S. 72 of the Government of India Act, 1915, made a further Ordinance (referred to as Ordinance No. IV of 1919) in the following terms:

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"GOVERNMENT OP INDIA."

"Legislative Department,

NOTIFICAION.

"Simla, the 21 *st April* 1919.

"An Ordinance further to extend the Application of the Martial Law Ordinance, 1919.

"WHEREAS an emergency has arisen which renders it necessary to provide that commissions appointed under the Martial Law Ordinance, 1919, shall have power to try persons and ***offences*** other than those specified in the said Ordinance;

"Now, therefore, in exercise of the power conferred by Section 72 of the Government of India Act, 1915, the Governor-General is pleased to make and promulgate the folloing Ordinance:

"Ordinance No. IV of 1919.

"Short Title.

"This Ordinance may be called the Martial Law (Further Extension) Ordinance, 1919.

*"Commissions uuder*Martial Law Ordinance, 1919, *to try such cases as the Loeal Government may direct.*

"2. Notwithstanding anything contained in the Matrial Law Ordinance, 1919 the Government may, by general or special ord3r, direct that any commission appointed under the said Ordinance shall try any person charged with any offence committed on or after the 30th March, 1919, and thereupon the provisions of the said Ordinance shall apply to such trials accordingly, and a commission may pass in respect of any such offence any sentence authorised by law.

"CHELMSFORD.

" *Viceroy and Governor-General.*

"H.M. SMITH,

" *Offg. Secretary to the Government of India"*

On the 22nd April the Governor-General in Council made a further order under ***Regulation*** X of ***1804***, wereby after reciting that he was satisfied that a ***state*** of open rebellion existed in the districts of Lahore, Amritsar, Gujranwala and Gujrat, he suspended the functions of the ordinary Criminal Courts in those districts in so far as trials held before Commissions in accordance with the provisions of Martial Law Ordinance No. IV of 1919 were concerned.

The Local Government of the Punjab was instructed by the Government of India that the Commissions appointed under Ordinance No. IV were to be used only for the trial of ***offences*** arising out of the recent disturbances.

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The appellants having been charged with ***offences*** under various sections of the Penal Code, including Sections 121, 302 and 412, as having been committed on the ***10th*** April, the Local Government, acting under Ordinance No. IV of 1919, directed that they should be tried by the Court of Commissioners appointed under Ordinance No. 1 sitting at Lahore with the powers of a summary general Court-Martial, and convened the Commissioners for that purpose. The trial accordingly took place on the 29th May and the following days, and judgment was pronounced on the 2nd June. The Commissioners, while convicting the appellants (other than Ghulam Hassan) of an offence under Section 121, added that certain of the accused could also be convicted under Section 302, *i. e.* for murder, but that they saw no necessity to discriminate, especially as in circumstances like those before them there was only one possible penalty for the offence or ***offences*** committed. Thereupon special leave was obtained from the Board to present this appeal.

Before the hearing of the appeal it was suggested by counsel for the appellants that Ordinance No. IV of 1919 was capable of being construed as intended only to extend the operation of Ordiance No. 1 to ***offences*** committed before the 13th April, but not earlier than the 30th March, and accordingly that this Ordinance (like Ordinance No. 1) applied only to persons taken in the act of committing one of the ***offences*** specified in ***Regulation*** X of ***1804***. In their Lordship's opinion the Ordinance cannot be so construed. It is introduced by a recital that an emergency has arisen which renders it necessary to provide that Commissions appointed under the earlier Ordinance shall have power to try persons and ***offences*** other than those specified in that Ordinance; and it empowers a Commission to try any person charged with any offence committed after the specified date, and to pass in respect of such offence any sentence authorised by law. It would be difficult to find words indicating more clearly that the operation of the Ordinance is not to be confined to the persons and ***offences*** described in the earlier Ordinance.

It was then argued that, if Ordinance No. IV applied (subject to the direction of the Local Government) to any

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person and to any offence known to the law, it was invalid by reason of the provisions of Section 65, Sub- sections (2) and (3) of the Government of India Act, 1915; and this contention, upon which the argument for the appellants mainly rested, must now be examined.

Section 65, Sub- section (2), when read with Section 72, prevents the Governor-General from making.-

"any law affecting the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom

of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or affecting the sovereignty or dominion of the Crown over any part of British India."

It was contended that the Ordinance under consideration, by depriving British subjects in India of the right to be tried, in the ordinary course by the established Courts of Law, affected the unwritten laws or constitution whereon the allegiance of His Majesty's subjects in India depends, and was accordingly invalidated by the sub- section last referred to; and reference was made to *Calvins case*[1] and to the maxim *"protectio trahit subctionem et subjectio protectionem."* It is not easy to understand how the substitution for the ordinary Indian Courts - which are themselves of statutory origin - of another tribunal of a judicial character, can be said to affect in any way the unwritten laws or constitution of the country; but, apart from this observation, the argument appears to rest upon a misconception as to the meaning and effect of the subsection. The sub- section does not prevent the Indian Government from passing a law which may modify or affect a rule of the constitution or of the common law upon the observance of which some person may conceive or allege that his allegiance depends. It refers only to laws which directly affect the allegiance of the subject to the crown, as by a transfer or qualification of the allegiance or a modification of the obligations thereby imposed. In the case of *In re Ameer Khan*[2] the meaning of a similar provision in the Act of 1833 (3 and 4 Wm. IV, c. 85, sec. 43) was discussed at length, and Mr. Justice Phear ***stated*** his opinion as follows:

"But I think it right to say that in my judgment the words 'whereon may depend, &c.,' do not refer to any assumed conditions precedent to he performed by or on behalf of the Crown as necessary to found the allegiance

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of the subject, but to laws or principle; which prescribe the nature of the allgiance, *viz*, of the relations between the Crown on the one hand and the inhabitants of particular provinces, or particular classes of the community, on the other; and obviously such laws and principles as these are not touched by the local Acts which are impeached before us.

Since that judgment was pronounced the provision so interpreted his been re-enacted substantially in the same terms in the Acts of 1861 and 1915 and many statutes and ordinances have been passed in India which were similar in effect to the ***Regulation*** then under consideration. If their Lordships were to adopt the argument now pressed upon them, they would be casting doubt upon, a long course of legislation and judicial decision which must be presumed to have been known to and in the view of the Imperial Parliament when the Act of 1915 was passed. (See *The Queen* v. *Burah*[1]). Reference may also be made to the recent case of *Besant* v. *The AdvocateGeneral of Madras*[2] where a like argument was rejected by the Board. This argument, therefore, cannot prevail.

Turning now to Section 65, Sub- section (3), of the Act of 1915, that sub- section is as follows.-

"The Governor-General in Legislative Council has not power, without the previous approval of the Secretary of ***State*** in Council, to make any law empowering any court, other than a High Court, to sentence to the punishment of death any of His Majesty's subjects born in Europe, or the children of such sub. jects, or abolishing any High Court."

Upon this enactment it was argued that Ordiance No. IV, if it subjects any person whatever to be tried for his life by a Commission in lieu of the ordinary Courts of Law or Courts-Martial, is an infringement of the provision which prevents the Governor-Generel in Council from empowering any Court other than a High Court to sentence to death any of His Majesty's subjects born in Europe, and accordingly that the Ordinance is void not only as to persons falling within Sub- section (3) but altogether. The answer to this contention is to be found in Section 2 of the Government of India (Amendment) Act, 1916, which provides that there shall be inserted at the end of Section 84 of the Act of 1915 the following words:

"A law made by any authority in British India and repugnant to any provision of this or any other Act of Parliament shall, to the extent of that repngnancy, but not otherwise, be void."

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It appears to their Lordships that if the Ordinance in question in this case contravenes S. 65(3) of the Act of 1915, it may properly be described as "repugnant" to that section so far as British-born subjects are concerned, and if so it is void to the extent of that repugnancy, but not otherwise. This argument, therefore, also fails.

For the above reasons their Lordships will humbly advice His Majesty that this appeal fails and should be dismissed. There will be no order as to costs.

Solicitors for appellants: *Barrow, Rogers & Nevill.*

Solicitor for Respondent: *The Solicitor, India Office.*

A.P.P. -----

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1 (1799) 8 Term Rep. 352 at P.356.

1 (7 Rep., 5)=2 How. St. Trials 559.

2 (1870) 6 ***Bengal*** Law Reports, 392.459.

1 (1878) L.R. 3. A.C. 889, 907: 5 I.A. 178.

2 (1919) L.R. 46 I.A. 176, 191.

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