Bombay High Court
Emperor vs Vinayak Damodar Savarkar on 6 October, 1910
Equivalent citations: (1911) 13 BOMLR 296
Author: B Scott
Bench: B Scott, Kt., N Chandavarkar, Kt., Heaton
JUDGMENT

Basil Scott, C.J.

1. The accused Vinayak Damodar Savarkar was committed to this Court by Mr. Montgomerie, First Class Magistrate of Nasik, for trial upon charges framed under Sections 121, 122 and 123 of the Indian Penal Code. At the commencement of the trial here the accused said that he would take no part in the trial but asked for an adjournment and for facilities to make to the British and to the French Governments representations regarding what he contended was his illegal arrest in Marseilles after he had escaped from the custody of police officers charged with the duty of bringing him from England to Bombay. His application was refused on the ground that it was beyond the province of this Court to do anything more than try him for the offences in respect of which he had been committed for trial. The trial then proceeded against him and other accused pointy charged with him. After certain witnesses had been (sic) mined Mr. Baptista, appearing for certain of the accused (sic) to put questions to one of the police witnesses regarding the escape and re-arrest of Vinayak at Marseilles with a view to show that the re-arrest was illegal and with the intention of contending thereon that the trial of Vinayak was without jurisdiction and that if so the trial could not proceed against the prisoners charged jointly with him. The Court upon this heard arguments as to what would be the effect on the trial of proof that the arrest was illegal.

2. The learned Advocate-General without admitting any of the allegations made regarding the re-arrest at Marseilles contended that the circumstances of Vinayak's re-arrest were irrelevant.

3. This contention is, in our opinion, correct. It appears that Mr. Montgomerie, a First Class Magistrate at Nasik, upon a complaint, duly authorized under Section 196 of the Criminal Procedure Code and sanctioned so far as it concerned offences committed out of India under Section 188, issued a warrant directing that Vinayak should be brought to Nasik from Bombay where he was expected to land on or about the 22nd of July 1910 to be dealt with according to law. Vinayak arrived in Bombay as expected, having been sent out to India under the Fugitive Offenders Act by a Magistrate in London, and was taken to Nasik under Mr. Montgomerie's warrant. The charges against him were there investigated by Mr. Montgomerie under the procedure prescribed by the Criminal Law Amendment Act, 1908, and he was then committed for trial to this Court as already stated. For the purpose of argument we will assume that Vinayak escaped from custody at Marseilles and was re-arrested there by the British Police under circumstances not authorized by the warrant which they held, or by Section 66 of the Criminal Procedure Code, or Section 28 of the Fugitive Offenders Act.

4. The argument based by Mr. Baptista on these assumptions is one which had often been advanced before but, so far as we are aware, always without success.

5. Where a man is in the country and is charged before a Magistrate with an offence, under the Indian Penal Code it will not avail him to say that he was brought there illegally from a foreign country. This appears very clearly from Lord Chief Justice Cockburn's charge to the Grand Jury in The Queen v. Nelson and Brand Charge of Lord Chief Justice Cockburn to the Grand Jury, 2nd Edn., in the case of Queen v. Nelson and Brand, Page 118. It was held that George William Gordon had been by an illegal and unwarrantable act arrested and conveyed by the Governor and Customs of Kingston in Jamaica to Morant Bay in that island, and there placed before a Military Court Martial administering Martial law in Morant Bay not in Kingston. The Lord Chief Justice, however, held that having been brought within the ambit of Martial law he was liable to be tried under it. He said (at pp. 118 and 119): "When Mr. Gordon was brought within the ambit or sphere of the

jurisdiction of Martial law--assuming always, on this part of the case, that there was such a jurisdiction--it seems to me that it was not for the parties administering the Martial law to inquire how he had been brought there. I will illustrate the matter by a case which has happened before now. Suppose a man to commits crime in this country, say murder, and that before he can be apprehended he escapes into some country with which we have not an Extradition Treaty, so that we could not get him delivered up to us by the authorities and suppose that an English Police-Officer were to pursue the malefactor, and finding him in some place where he could lay hands upon him, and from which he could easily reach the sea, got him on board a ship and brought him to England, and the man were to be taken in the first instance before a Magistrate, the Magistrate could not refuse to commit him. If he were brought here for trial, it would not be a plea to the jurisdiction of the Court that he had escaped from justice, and that by some illegal means he had been brought back. It would be said 'Nay, you are here; you are charged with having committed a crime, and you must stand your trial. We leave you to settle with the party who may have done an illegal act in bringing you into this position; settle that with him.' So here, although if Mr. Gordon had been put to death, but had been subjected to some minor punishment, some of those scourging or other things that we have heard of in Jamaica--if he had come to England and had brought an action for damages against Governor Eyre, it may well be that a jury of Englishmen, presided over by an English judge, would have awarded him exemplary damages for the wrong that had been done him; but that does not affect the question we are now considering, namely, whether, having been brought within the ambit of the Martial law, he was liable to be tried under it. I cannot but think that he was. "the report of In re Parisot (1889) 5 T.L.R. 844 affords two instances in which the same view was taken by the Court upon protests being made by prisoners as to the illegality of their arrests outside the British Islands. In one case the arrest was in Brussels; in the other in Jersey.

6. In In re Susannah Scott (1829) 9 B. & C. 446 the alleged illegality of an arrest in Brussels was held to be irrelevant.

7. The principle upon which these cases are based underlies also Section 188 of the Criminal Procedure Code which, in that Vinayak a Native Indian subject is charged inter alia in respect of certain offences committed in London, applies to this case. Under that section it has been held in Empress v. Maganlali (1882) I.L.R. 6 Bom. 622 that a Native Indian subject arrested without a warrant by British Indian Police in a Native State and brought to Ahmedabad was ' found' in Ahmedabad so as to give jurisdiction to the Magistrate at that place.

8. This decision followed that of fourteen Judges sitting in the case of Queen v. Lopez (1858) 27 L.J.M.C. 48 where it was held that a man is 'found' for the purposes of criminal jurisdiction under 18 & 19 Vict. Clause 91, Section 21, wherever he is actually present whether or not he has been brought to that place against his will.

9. Mr. Baptista his, however, relied upon the judgment of the Judicial Committee in Muhammad Yusufuddin v. Queen Empress (1897) L.R. 24 I.A. 137, as being inconsistent with the cases relied upon by the prosecution since the Judicial Committee held that an arrest of a Hydrabad subject at a station on a Railway line in the Hydrabad State over which the Queen-Empress had no general criminal jurisdiction was illegal and advised Her Majesty that the warrant and arrest and the proceedings thereon should be set; aside.

10. It is to be observed, however, that the Lord Chancellor in delivering judgment was careful to point out that their Lordships were called upon to pronounce their opinion as to the legality of the arrest, but they had nothing to do with the question whether: or not if the accused had been found within British Territory he could have been lawfully tried and convicted; nor with the consequences of the arrest being lawful or otherwise. The judgment does not purport to deal with the question whether an illegal arrest in foreign territory vitiates an inquiry by a Magistrate into an offence against Indian Penal Code charged against the person arrested when brought before the Court ; nor does it appear from the report that the question was argued. That has, therefore, no bearing upon the question now under consideration.

11. For the above, reasons we hold that both under Section 188 of the Criminal Procedure Code, as regards offences committed in London, and apart from that section, as regards offences committed in British India,

neither the jurisdiction of the Magistrate to inquire into the case nor the jurisdiction of this Court to try it can be affected by any illegality in connection with the rearrest of Vinayak which may have occurred at Marseilles.