

MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

G.O. No.	727	Press
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MILITARY DEPARTMENT.
PROCEEDINGS OF THE MADRAS GOVERNMENT.

Read the following papers :—

From the Deputy Secretary to the Government of India, Military Department, Fort William, 12th March 1861, No. 377; to the Secretary to Government, Military Department, Fort Saint George.

I am desired to transmit, for the information of the Honorable the Governor in Council, transcript of a report of a trial and judgment in the Court of Queen's Bench, in which an Officer, late of the 82nd Foot, tried in India by Court Martial and sentenced to four years' imprisonment, is ordered to be discharged from custody, in consequence of the inability of the Governor of the Queen's Prison, to which he has been transferred, to produce an Order from the Military Authorities in India to the Keeper of the Queen's Prison to receive him.

I am further desired to request that you will move His Honor in Council to cause the particular attention of the Military Authorities to be called to the judgment of Chief Justice Cockburn, that they may hereafter duly fulfil the requirements of the Act 20 and 21, Vict. Cap. 66 (40 and 41) in all cases in which there may be a necessity for transferring a Military Prisoner to England.

Statement of the case of Lieutenant William Henry Craven Allen.

A Rule was recently obtained from the Court of Queen's Bench, calling on His Royal Highness the Commander-in-Chief and the Governor of the Queen's Prison to show cause why a Writ of Habeas Corpus should not issue to bring up the body of William Henry Craven Allen, a Lieutenant in the 82nd Foot, in order that he might be discharged.

The grounds upon which it was granted were that, by the 38th Section of the Mutiny Act it is provided, "That the place of imprisonment under the sentence of General Courts Martial shall be appointed by the Officer Commanding the District." Lieutenant Allen was tried by a General Court Martial at Shahjehanpore for the crime of wilful murder. The Court acquitted him of the crime of wilful murder, but found him guilty of Manslaughter, and sentenced him to four years' imprisonment. The sentence was confirmed by the Officer Commanding the District, who appointed the Fortress of Agra in the Bengal Presidency, as the place where the sentence should be carried out. Lieutenant Allen was accordingly confined at Agra up to November 1859, when he was removed to Fort William at Calcutta, whence he was brought to England, and at first imprisoned at Chatham, and subsequently removed to Millbank, and, ultimately, to the Queen's Prison.

It appears by an Affidavit of Lieutenant Allen, that whilst undergoing his sentence at Agra he received from Major Patton, Brigade Major, a letter in the following terms, viz:—

My Dear Sir,

"Instructions have been received to send you by Bullock Train to Cawnpore in progress to Calcutta, and thence to England—will you be good enough to tell me when you will be ready to start."

"Yours truly,

"B. PATTON."

That on the 20th November 1859, he was removed from Agra to Calcutta, when he was confined in Fort William from 23rd December 1859, the date of his arrival, until 30th January 1860.

That on the day after his arrival, he received a memorandum from Major Seymour Blane, of which the following is a copy, viz:—

No. 337.

MEMORANDUM.

BRIGADE OFFICE, the 24th December 1859.

"The instructions received respecting Lieutenant Allen, 82nd, are so very vague and undefined, that Brigadier Smith, Commanding in Fort William, does not at present feel justified in placing him on his parole.

"SEYMOUR BLANE, Major,
"Brigade Major."

"LIEUTENANT ALLEN, 82nd"
"Dispensary."

And that on 30th January 1860, he quitted Fort William in pursuance of orders, and embarked on boardship for England, leaving his Regiment in India.

He also states in another Affidavit that he has never been able to ascertain by whose orders or by what authority he was removed from India to England.

Previously to the argument coming on before the Court, a case, stating all the material facts, was laid before the Attorney and Solicitor General, and the following is an extract from their opinion:—

"We are of opinion that Lieutenant Allen is not legally in custody in England under sentence of the Court Martial pronounced upon him in India. We think simple imprisonment, when awarded by a Court Martial out of England, must be taken to mean imprisonment within the limits of the particular Dependency or Colony—otherwise the distinction between imprisonment and transportation which is very distinctly observed in the Mutiny Act, would for all practical purposes be set aside. Agra was, it appears to us, the legal place of imprisonment, having been appointed for that purpose by Lord Clyde, in pursuance of the 38th Section of the Mutiny Act, 1857-1858. The Sections of the Mutiny Act (39 and 40 of the Acts of 1857-1858, and 1859, and 29 and 30 of the Act 1860, as to Military Prisons, Gaols, &c.) do not in our judgment obviate the difficulty, those Sections being capable of full application in connexion with the entire legality under the circumstances of the place of imprisonment.

"We think therefore that on argument, the Court will pronounce Lieutenant Allen to be entitled to his discharge."

The Counsel for the War Department, upon shewing cause against the rule, submitted that the question for the Court was whether Lieutenant Allen, then a Prisoner, undergoing imprisonment in the Queen's Prison for the crime of Manslaughter, was illegally in custody. They also contended that the offence with which Lieutenant Allen was tried, was not a Military offence triable by the Civil Tribunal, but that owing to the distance the Prisoner's Regiment was stationed from Calcutta, the authorities had acted under the provisions of the Articles of War which were made by Her Majesty in pursuance of the powers contained in the first Section of the Mutiny Act 1857.

Reference was also made to the 41st Section of the Mutiny Act, which provides that the Officer who appointed the place where the Prisoner should be imprisoned, may, by his order in writing, direct that the Prisoner be transported to some other place to undergo the remainder of his sentence.

The Chief Justice of the Queen's Bench delivered judgment in the following terms, viz:—

"Upon this state of facts I entertain no doubt if they cannot be altered, that this imprisonment is illegal, and that Lieutenant Allen is entitled to his discharge. One may regret that in a case of the serious offence with which he has been found guilty that a miscarriage in the manner of carrying the sentence passed upon him into execution, should have occurred so as to entitle him to his liberation before the sentence which, I have no doubt, was justly passed upon him, has been completed. But what we have to look at is, to see whether his present imprisonment is one which in point of law can be justified—I am clearly of opinion that it cannot. He was tried for an offence cognizable only by a constituted Civil Tribunal, except by virtue of a special provision in the Mutiny Act and the Articles of War which are incorporated into the Mutiny Act. Now the powers given to a Court Martial to try a case of Homicide are limited: they can find the party charged guilty of the offence, and they can pass upon him a sentence of imprisonment; but the Act does not confer upon the General Court Martial, trying such an offence, the power and authority to declare where the sentence of imprisonment that they have passed, shall be carried into execution. It vests the authority to direct where the place of punishment shall be in the Officer Commanding the District. The Officer Commanding the District in the present instance appointed a specified place for the imprisonment, namely Agra, in the East Indies. We find that the Prisoner instead of undergoing the imprisonment at Agra, is undergoing imprisonment in this country, and that imprisonment is not conformable to the sentence passed upon him by the authority specified and limited by the Act of Parliament.

We have to inquire whether the commutation of punishment, or rather the change of the place of punishment has been ordained by any person having authority under the Act of Parliament, because the whole of this proceeding, the whole of the authorities and powers under which these proceedings are carried out, are derived entirely from the enactments of the Legislature. They are contrary to Common Law, and exist only by Legislative Enactment. The only power that there appears to be under the Mutiny Act, and the Articles of War for changing the place of imprisonment where sentence of imprisonment has been passed, and the place specified in the Act of Parliament is, under the 41st Section of the Mutiny Act which enables the Commanding Officer of the District, the Officer appointed by the 38th Section to declare where the place of the imprisonment shall be, and to change that place of imprisonment in a specified and given manner, at present there is nothing before us to show that Lord Clyde, the Officer Commanding the District, who directed and appointed the place of imprisonment to be Agra, has done any thing under the 41st Section by the powers thereby conferred upon him to change the place of imprisonment from Agra to this country—assuming that to be so, then the imprisonment having been appointed to be at Agra, but being actually in this country, is in this country unlawful, and the Prisoner is entitled to his discharge. But if the Solicitor General thinks that between this and to-morrow, there is reason to think that the proceedings have been regular, and that there was an order from Lord Clyde to change the place of imprisonment from Agra to this country, as that might have been done under the 41st Section, if the facts warrant any reasonable belief of information, if the Solicitor General intimates that he may be able to obtain any thing that would warrant a reasonable belief that, that were so, the Court would pause before it would order the liberation and discharge of the Prisoner, and give an opportunity of ascertaining and bringing to its knowledge such a fact. But unless the Solicitor General, who I am sure, will act with the most perfect good faith in the matter, should be of opinion that he can find on inquiry, there is good and reasonable ground to believe that, that could be established, we make the rule absolute to discharge the Prisoner."

The prosecution availed themselves of the time allowed by the Court for offering further evidence, and an affidavit by the Solicitor for the War Department was filed in which it is stated, that—

"He had seen Lord Clyde who had informed him, that he had directed the Adjutant General of the Forces to issue an Order, addressed to the Commanding Officer of the Fort at Agra, for the removal of Lieutenant Allen from Agra to Calcutta, for the purpose of being embarked for England, and that the Adjutant General was the proper Officer to sign such Order upon his receiving his (Lord Clyde's) directions so to do, and that according to his belief it was in pursuance of such an Order that Lieutenant Allen was removed from Agra to England."

The Court were, however, unanimous in thinking Lieutenant Allen's imprisonment illegal, as will be seen by the following judgments delivered by their Lordships.

The Lord Chief Justice.

"I think it would be useless to delay coming to a decision in this case, or enlarging this rule with a view to any further investigation of the facts, because I think even assuming the facts that are suggested in the affidavit which Mr. Solicitor General has brought under our notice this morning, that nevertheless the result would be if those facts should be clearly established, that this rule must still be made absolute."

"It is not necessary to determine the preliminary question which has just been argued by my brother Shies, as to whether this case does fall within the provisions of the 41st Section of the Mutiny Act. It is clear that even if it does fall within that Section, that the provisions of the Act of Parliament have not been complied with, and that as the case now stands there is no legal Warrant by virtue of which the Keeper of the Queen's Prison can hold Lieutenant Allen in custody. The 40th Section and the 41st Section of the Mutiny Act seem to be somewhat at variance. The 40th Section provides for the reception by any Governor, Provost Marshal, Gaoler, or occupier of any public Prison, Gaol or House of Correction in any part of Her Majesty's Dominions into his custody of any Military offender under sentence of imprisonment by a Court Martial. It makes the obligation on such Governor or Gaoler to receive the Prisoner and hold him in custody, and subject him to the discipline whatever it may be of the Gaol or House of Correction. It makes the obligation to depend on the receipt by him of an Order in

writing in that behalf from the Officer Commanding the Regiment or Corps to which the offender belongs, and then the 41st Section provides "that where the Prisoner is undergoing imprisonment under the sentence of a Court Martial in any other public Prison other than the Military Prison set apart by the authority of this Act, or in any Gaol or House of Correction in any part of Her Majesty's Dominions, &c., &c. (The Lord Chief Justice read down to the words) as a witness or for trial."

"Now one Section makes the order of the Officer Commanding the Regiment, the condition of the Gaolers receiving the offender for the purpose of imprisonment, the other makes the order of the Officer Commanding the District, the condition of his being taken from one Gaol and removed from that to another, but still it might be a question even after that in order to make the occupier of a public Prison not being a Military Prison liable or bound to receive the offender, whether there must not be an Order from the Commanding Officer of the Regiment. It is not necessary to decide how that may be, or whether the case falls within the provisions of the 41st Section. It is not necessary to decide any of those difficulties that have been pointed out by the Bar or the Bench. It is enough to say that there is no order in writing under either of these Sections by virtue of which the occupier of the Queen's Prison can keep him in custody because, all that appears to have taken place, if we assume all the facts in the affidavit of the Solicitor General is, that Lord Clyde being the Commanding Officer of the District having first directed that Lieutenant Allen should be placed in Agra, afterwards makes some Order which we have to assume for the present purpose to be a valid one, that the Prisoner may be removed from the prison at Agra and sent in Military custody to this country to undergo the remainder of his imprisonment, but it does not appear that either from the Officer Commanding the Regiment or from Lord Clyde, as the Officer Commanding the District, there was ever any Order to the occupier of the Queen's Prison to receive Lieutenant Allen as a Prisoner in this country. He seems to have been sent over without any direction made by Lord Clyde as to the Prison in which he is to be imprisoned. That deficiency has been attempted to be supplied by an Order under the hands of the Adjutant General, as representing the Commander-in-Chief of Her Majesty's Forces, but there is no provision in the Act of Parliament with reference to the case of an offender imprisoned under the sentence of a Court Martial in the East Indies, or parts of Her Majesty's Dominions beyond the seas. There is no provision that on such a Prisoner being sent to this country without any Order as to the Gaol or Prison in which he shall be confined for the Commander-in-Chief here, either under his own hand or by the hand of the Adjutant General, to make an Order to supply the deficiency. It follows therefore, assuming the 41st Section, to have application to a case of this sort, that there has been no Warrant, or Order in writing equivalent to a Warrant for the imprisonment of Lieutenant Allen in the Queen's Prison under or by virtue of the powers given by that for the imprisonment of Lieutenant Allen. It follows that he is in a custody which is unlawful, because there is no Warrant. The case is not like the case of the Canadian Prisoners, cited by the Solicitor General, because in that case the party was liable to be tried in this country for high Treason, and being liable to be tried was confined at a place other than that in which the offence was committed, and this Court could not interfere to set him free in order that he might escape from the consequences of the offence that he had committed, and escape a trial to which he was properly subjected. That case is not like the present, where a party is in custody without any lawful cause, and is undergoing imprisonment; which being without lawful Warrant is an unlawful one. I apprehend that he is entitled to be discharged."

Mr. Justice Hill.—"I am of the same opinion. The 38th Section has been complied with in this case by Lord Clyde fixing upon Fort Agra as the place where Lieutenant Allen should be confined during the four years mentioned in the sentence passed upon him, and assuming for the purposes of this case that it is within the 41st Section, and that it was open to Lord Clyde as the Officer who confirmed the Proceedings of the Court or of the Officer Commanding the District, Garrison or Colony to give an Order in writing, directing the Prisoner to be removed to some other Prison or place, there to undergo the remaining part of the sentence. The only Order I understand to be given in this case was an Order given by Lord Clyde for the purpose of the Prisoner being removed to England, there to undergo the remainder of his sentence, the Prisoner is found in this country and being in the Queen's Prison, he says, he is unlawfully there. The question to be asked is what is, the Warrant for his detention in the Queen's Prison. What is

the authority under which he is detained there—now the only Warrant is one proceeding from the Horse Guards, signed by the Adjutant General, stating that he was sentenced to four years' imprisonment, having been convicted of Manslaughter by a Court Martial, and authorizing the Justices to detain him for the residue of his sentence—but I find no authority in the Mutiny Act authorizing the Adjutant General to give such an Order, or for the Commander-in-Chief to issue it.

"The only Section of the Mutiny Act authorizing the Gaoler to receive and to retain an Officer or other Military man in custody under any sentence is the 40th Section, the Order provided by that Section must be signed by the Officer Commanding the Regiment. There is no such Order or Warrant in the case. Therefore, there being no legal Warrant to keep Lieutenant Allen in custody, we are constrained, I confess so far as my own feelings go unwillingly, to say that he ought to be discharged."

Mr. Justice Blackburn.—"I am of the same opinion. In the Canada Prisoner's case as to the party who applied for the Habeas it was shewn that he was under the circumstances in which he might justify being detained at Common Law. He was admitted by his own confession to be guilty of the crime of High Treason, and he had not been tried or had not been pardoned and there was nothing to prevent his being tried in this Court, and being found guilty of High Treason, and any person in whose custody he was, might at Common Law detain him. For that reason the Court did not discharge him; but in the present case, Lieutenant Allen is in this country, and he is detained under circumstances where the Common Law would not detain him. He is detained and the substantial reason of this detention is because he had been tried by a Court Martial in India, and there sentenced to four years' imprisonment—now that is not a cause for his detention at Common Law—and what is necessary to be shewn for the purpose of authorising his detention? It is necessary to show that he is brought within the terms of some Statutable authority to detain him. The Mutiny Act is no such authority that enables Prisoners to be detained under many circumstances; but wherever the person is detained out of the course of Common Law under that Act, it is essential that those detaining him should show that the Statutable authority has been so pursued that they are justified in detaining him, under the authority given in the Act of Parliament, he not being there under circumstances by which he could be detained at Common Law without the aid of that Act."

"Now I will not repeat, because I do not think it necessary to repeat what has been said by my Lord Chief Justice and my brother Hill only confining myself to saying this—that I do not think it has been shown under those circumstances giving full credit to what Lord Clyde says he believes happened in India. I have no doubt whatever that an Order was sent from his own recollection to the Adjutant General—I do not doubt that the Order in writing was existing as he says, but giving full credit to what he says, I agree for the reasons already stated by the rest of the Court, that the case is not brought within any of the provisions of the Statute, and consequently that the Keeper of the Queen's Prison is not justified in detaining Lieutenant Allen, and as has been already intimated in the course of the argument, it really is a matter worthy of great consideration for the Government, whether they will not revise the Act in the case of Mutiny, so as to make provision for the future to meet such a case as this, but that is not a matter for us to deal with, it is a matter entirely for them."

Upon the delivery of these judgments, the Solicitor General advised the immediate release of Lieutenant Allen from custody—and it is stated by the Solicitor to the War Office, that no less than eight actions consequent on this transaction are now pending.

ORDER, No. 1452, 23rd April 1861.

Communicated to the Provincial Commander-in-Chief and to the Judicial Department, for communication to the Government Law Officers.
(True Extract.)

Marshall
Secretary to Government.

To the Adjutant General.
Judicial Department.
Exd. J. E. Cashart.

With 6 spare Copies

