

1926

*Nov. 2.

*Nov. 4.

JUNGO LEE (DEFENDANT).....APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF) .. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH
COLUMBIA

Criminal law—Alien—Conviction under Opium and Narcotic Drug Act, 1923 (D.), c. 22, s. 4 (d)—Accused held for deportation under s. 25—Immigration Act (D.) 1910, c. 27—Habeas corpus proceedings—Appeal to Supreme Court of Canada—Jurisdiction—Supreme Court Act, R.S.C., 1906, c. 139, s. 36, as enacted 1920, c. 32.

Where an alien has been convicted, after his entry into Canada, of an offence under para. (d) of s. 4 of *The Opium and Narcotic Drug Act, 1923, (D.), c. 22*, and, after expiry or determination of the period of

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

imprisonment imposed upon him on such conviction, he is held in custody awaiting deportation, under a warrant showing on its face that he is so held as a consequence of such conviction, under the authority of s. 25 of said Act, any "proceedings for or upon a writ of habeas corpus" directed to bring him before the court in order that the legality of his detention under such warrant may be enquired into, are necessarily proceedings "arising out of a criminal charge," and come within the exception to the jurisdiction of the Supreme Court of Canada under s. 36 of The Supreme Court Act.

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MOTION on behalf of His Majesty the King for an order quashing the appeal brought by the defendant on the ground that the court is without jurisdiction to hear the appeal because the judgment from which the same is brought is a judgment in proceedings for or upon a writ of habeas corpus arising out of a criminal charge. The facts are sufficiently stated in the judgment now reported.

The defendant's appeal was from the judgment of the Court of Appeal for British Columbia (1), dismissing an appeal from an order of Morrison J., refusing, on the return to an order *nisi* for habeas corpus, to release the defendant from close custody under an order or warrant of deportation, dated 21st March, 1923, made by the Deputy Minister of Immigration and Colonization.

O. M. Biggar, K.C. for the motion.

W. Schroeder contra.

The judgment of the Court was delivered by

ANGLIN C.J.C.—The respondent moves to quash this appeal on the ground that it is an appeal "in proceedings for or upon a writ of habeas corpus arising out of a criminal charge" within the exception to the jurisdiction of this court made by s. 36 of the *Supreme Court Act* (as amended 1920, c. 32).

The appellant is an alien and was convicted after his entry into Canada of an offence under para. (d) of s. 4 of *The Opium and Narcotic Drug Act, 1923*. Section 25 of that statute enacts that any alien so convicted

shall, upon the expiry or sooner determination of the imprisonment imposed on such conviction, be kept in custody and deported in accordance with the provisions of the Immigration Act relating to enquiry, detention and deportation.

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The warrant on which the appellant is held in custody awaiting deportation shews on its face that he is so held, no doubt under the authority of s. 25 of *The Opium and Narcotic Drug Act, 1923*, as a consequence of his conviction of an offence against para. (d) of s. 4 of that statute. The scope of any enquiry under *The Immigration Act* in such a case must be limited to ascertaining officially that the person in question was an alien, that he had been convicted after his entry into Canada of an offence within the ambit of s. 25 and that the period of imprisonment imposed upon him on such conviction had expired or been determined. It follows, in our opinion that any "proceedings for or upon a writ of habeas corpus" directed to bring the convicted alien before the court in order that the legality of his detention under such warrant may be enquired into are necessarily proceedings "arising out of a criminal charge" within the meaning of s. 36 of the *Supreme Court Act*.

It is *nihil ad rem* that the alien has served the sentence imposed on him, except that the expiry or determination of his term of imprisonment is by s. 25 made a pre-requisite to the custody for, and the deportation which it ordains. The statute, in addition to such imprisonment as may be imposed, subjects him as a result of his conviction and, therefore, as something directly flowing from the judicial finding of his guilt of the criminal charge laid against him, to the further consequences prescribed by s. 25. It is impossible to say that the custody and deportation imperatively ordered by that enactment do not "arise out of the criminal charge" of which the alien was convicted; it is equally impossible to maintain that curial proceedings to enquire into the legality of the detention pending deportation do not likewise so arise.

The motion to quash is granted.

Motion granted.

Solicitor for the appellant: *A. J. B. Mellish.*

Solicitor for the respondent: *E. Meredith.*