

(1867) 09 CAL CK 0004
In the Calcutta High Court

The Queen

APPELLANT

Vs

Thompson

RESPONDENT

Date of Decision : 03-09-1867

Acts Referred:

Citation : (1867) 09 CAL CK 0004

Judgement

Sir Barnes Peacock, Kt., C.J.—When I first saw the charge, I thought it had been preferred in the High Court without having been made by a Justice of the Peace. I thought then that it could not be supported, because when the Legislature by Act XIII of 1865 abolished the Grand Jury, they enacted that a Justice of the Peace or Magistrate should deliver to the Clerk of the Crown a written instrument of charge, and that the Clerk of the Crown may, if he consider it necessary or expedient so to do, amend, alter, or add to the same. A Justice of the Peace or Magistrate is put in the place of a Grand Jury, and the written instrument of charge takes the place of a presentment or inquisition of a Grand Jury. Formerly in England the Master of the Crown Office used to present criminal informations for misdemeanors without the authority of the Court of King's Bench. Great abuses arose from the exercise of this power, and much oppression and injustice was done. In consequence the Statute 4th and 5th William and Mary, c. 18 was passed, whereby it was enacted that no such informations should be filed without the express direction of the Court of King's Bench. That Statute applies only to motions filed by the Master of the Crown Office, and not to ex officio informations by the Attorney-General. When the Grand Jury was abolished in this country, the Legislature made such provision as it considered necessary, and provided that a charge should be sent and delivered to the Clerk of the Crown by the committing officer, and it is important to see that a proper charge is sent up in the mode enacted. In the present case, such a charge has in point of fact been sent up. The only defect in the charge is that it does not appear on the face of it to have been delivered to the Clerk of the Crown by a Justice of the Peace. But we are not sitting here as a Court of Error, in which we could know nothing but what appeared on the face of the record. We are sitting as a Court which has all

the proceedings before it, and, therefore, although we do not see on the face of the record that the charge has been preferred by a Justice of the Peace, we know that it was so, and the Judge presiding at the trial would not have quashed the charge for the defect now relied upon, but would have caused it to be amended. Under these circumstances, although I think it ought to appear on the face of the charge that it was delivered to the Clerk of the Crown by a Justice of the Peace or Magistrate, still I think the defect of its not so appearing is a mere formal defect, to which objection could only have been taken, u/s 41 of Act XVIII of 1862, before the jury was sworn, and that it is not ground for arrest of Judgment. Section 41 speaks of an "indictment," but Section 7 of Act XIII of 1865 says, that "in Act XVIII of 1862, the word "indictment" shall be understood to include the word "charge," and all the provisions of the said Act shall apply to charges recorded as aforesaid and the trial of such charges."

2. Next, was the charge in accordance with English Law? The prisoner was charged with cutting and wounding with an intent which rendered the act an offence under 7 Wm. IV., and 1 Vict., c. 85, s. 2, and he was found guilty under 14 and 15 Vict., c. 19, s. 5. The question has been raised whether a charge made under 7 Wm. IV., and 1 Vict., c. 85, followed by a conviction under 14 and 15 Vict., c. 19, can be upheld in this Court, in the exercise of Criminal Jurisdiction under its Charter.

3. By the Merchant Shipping Act, 17 and 18 Vict., c. 104, s. 267, it is enacted that "all offences against property or person committed in or at any place, either ashore or afloat, out of Her Majesty's dominions, by any master, seaman, or apprentice, who at the time when the offence is committed is, or within three months previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishment respectively, and be enquired of, heard, tried, determined, and adjudged in the same manner, and by the same Courts, and in the same places, as if such offences had been committed within the jurisdiction of the Admiralty of England." The section applies to offences committed ashore or afloat out of Her Majesty's dominions. The word "offences" did not, in strict terms, mean offences against the law, but acts which, according to English Law, would amount to offences, if committed in England. The section is not applicable to this case; but I refer to it to show what must be the meaning of "any crime or offence" in s. 21 of 18 and 19 Vict., c. 91, (the Merchant Shipping Amendment Act of 1855). Section 1 of that Act enacts, that "it shall be taken to be part of the Merchant Shipping Act, 1854, and shall be construed accordingly." The Merchant Shipping Act has not been shown to apply to this case, for it is not charged or found that the prisoner was a "master, seaman, or apprentice," and we cannot assume that he was.

4. The 12 and 13 Vict., c. 96, extended to the Colonies generally, but "all such parts and places as are under the Government of the East India Company" were excepted. But c. 88 of 23 and 24 Vict., extends it to India. Section 1 of that Act enacted that "so much of the said Act 12 and 13 Vict., c. 96, as excepts the parts

and places then under the Government of the East India Company, from the interpretation of the word "colony," shall be repealed, and for the purpose of the said Act, the word "colony" therein shall include and apply to every part and place heretofore under the Government of the East India Company, or which may be under the Government of Her Majesty in India, and all the provisions of the said Act shall be construed and take effect accordingly."

5. The second section of 12 and 13 Vict., c. 96, enacts, "that if any person shall be convicted before any such Court of any such offence, such person so convicted shall be subject and liable to and shall suffer all such and the same pains, penalties, and forfeitures as by any law or laws now in force, persons convicted of the same respectively would be subject and liable to in case such offence had been committed, and were inquired, tried, heard, determined, and adjudged in England, any law, statute, or usage to the contrary notwithstanding." The only possible construction of that sentence is that they shall be liable to "all such and the same pains, &c," and those only. I can well understand that Parliament would prefer to make such person subject to the punishment imposed by English Law rather than by that of the colony. They might not be certain what that law was, or if aware of it, might not wish to extend it. For instance, a person convicted here of certain offences may be punished by whipping. The British Parliament, except in one or two special cases, has not sanctioned that punishment, and it may well be that it would not render a person so convicted liable to a punishment which it had not sanctioned for offences committed in England.

6. The prisoner being punishable then, as I think, according to English Law, it seems to me that he ought to be charged with an offence against the English Law. If he was charged with hurt under the Penal Code, how should we know what punishment to inflict. It appears to me, that a charge according to English Law is necessary to enable the Judge presiding at the trial to know what sentence he ought to pass.

7. Section 21 of the Merchant Shipping Amendment Act 1855 enacts, that "if any person, "(it does not say a master, seaman, or apprentice), "being a British Subject, charged with having committed any crime or offence on board any British ship, on the High Seas, or in any foreign port, or harbour; or if any person, not being a British Subject, charged with having committed any crime or offence on board any British ship, on the High Seas, within the limits of its ordinary jurisdiction, such Court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits." This is the case with the present prisoner, that is, he, a British Subject, has committed such crime or offence on board a British ship, on the High Seas, as this Court would have had cognizance of, if committed within the limits of its ordinary jurisdiction; therefore the Court has jurisdiction to hear and try the case as if such crime had been committed within such limits.

8. In hearing and trying the case in the same manner as if committed in India,

we must try him according to the provisions of Act XIII of 1865. The prisoner having been sent up by a Justice of the Peace with the charge on which he has been tried (or he has been tried on that charge amended by the Clerk of the Grown), the trial has been conducted according to the procedure of this country, (see Sections 3 and 4) although he is punishable according to English Law.

9. The 23 and 24 Vict., c. 88, s. 2 says, "the Supreme Court and all public officers and other persons in the Presidency shall have the same jurisdiction and authorities, and proceed in the same manner in relation to the person charged with such offence, as if the same had been committed, or originally charged to have been committed, within the limits of the ordinary jurisdiction of such Supreme Court." Section 21 of 18 and 19 Vict., c. 91, says, "if the person is found within the jurisdiction of any Court of Justice in Her Majesty's dominions, which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such Court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits: provided, that nothing contained in this section shall be construed to alter or interfere with the Act of the thirteenth year of Her present Majesty, chapter ninety-six."

10. The 23 and 24 Vict., c. 88, very properly extended the provisions of 12 and 13 Vict., c. 96, to this country, and thereby makes the prisoner subject and liable to "all such and the same pains, penalties, and forfeitures as by any law or laws, which at the time of the passing of that Statute, were in force, persons convicted of the same, respectively, would be subject and liable to, in case such offence had been committed and were inquired, tried, heard, determined, and adjudged in England, any law, statute, or usage to the contrary notwithstanding."

11. The 14 and 15 Vict., c. 19, s. 5, enacts that "if upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon such defendant shall be liable to be" punished in the same manner as if he had been convicted upon an indictment for the misdemeanour of cutting, stabbing, or wounding."

12. The charge then has been preferred under English Law, and it has been tried according to the procedure of Indian Law, and the punishment must be according to English Law. A sentence to imprisonment with hard labour is the same as rigorous imprisonment u/s 53 of the Indian Penal Code.

13. I think there are no grounds shown for arresting judgment.

Phear, J.

14. I think whether the offence be measured by English or by local law, at any rate the procedure is that prescribed by local law.

15. This appears, I think, from a comparison of Section 267 of the Merchant Shipping Act of 1854 with Section 21 of the Amendment Act of 1855. Although the first of these sections does not apply to the case before the Court, so far as the facts are disclosed in the record, it seems to me that the words in Section 267 are as explicit as words can be, to say that the manner and substance of the trial shall be that of the English Admiralty Court, while the words in Section 21 are quite different, and they certainly apply to this case. In view of this difference, it appears to me, that when this latter section gives jurisdiction to this Court to hear and to try as if the offence had been committed within the local limits of the Ordinary Original Criminal Jurisdiction, it means at least to direct that the trial should be conducted according to the procedure of the Court in that jurisdiction. If so, the mode of procedure proper to this trial would be that declared in Act XIII of 1865. Then, has that procedure been followed?

16. It has, if there was a charge preferred by a Magistrate or Justice of the Peace; and if the charge on which the prisoner was tried was framed on that by the Clerk of the Crown. There is no doubt this was the case. The record is in truth unimpeachable as the Chief Justice has stated, except so far as it does not disclose the written charge of the Magistrate. But as the written charge of the Magistrate is actually before the Court, that point, I agree, cannot arise now as matter of objection.

17. As to the question whether the offence is to be measured by English Law or local law, I do not now feel myself in a position to give an answer. The matter hangs upon statute, and not upon principle, and the two or three enactments which constitute the statute law on the subject, seem to have been passed without much reference the one to the other. Consideration of 18 and 19 Vict. c. 96, s. 21 (entirely different as it is from Section 267 of the Act of the previous year) together with s. 1 of 12 and 13 Vict. 96, which was made applicable hereby 23 and 24 Vict., c. 82, leads me rather to the present conclusion that the offence must be measured by local law. But if it were necessary to decide that point, I should like to have time for further consideration. At the same time I must say, that I do not feel the force of the argument drawn by the Chief Justice from the supposed meaning of the word "offence" in Section 267. I do not think that the words there used were intended to make a "master, seaman, Act. "punishable in an English Court of Admiralty for an act committed in foreign territory, merely on the ground that it was such that if it had been done within the jurisdiction of the Admiralty of England, it would have been criminal, and independently of whether it was justifiable under the law prevailing in that territory. During the short period of my legal experience--short compared with that of the Chief Justice--I have become very familiar with discussions among the ablest and most learned men in England as to the proper meaning to be attached to the terms "offence" and "crime;" and the most common result arrived at by the disputants was that

the words meant any thing that was *malum in se*, and that an English Court of Criminal Justice ought always, theoretically, to punish an act falling under this head (whatever it may amount to) if it had the malefactor in its power. It appears to me, for the moment, that the word "offence" in Section 267 is used in some such vague sense as this, and I do not feel at all sure that an offence out of the British Territory does not there mean something different from that which is an offence under English Law alone. But whether the offence be governed by English or by Indian Law, singularly enough perhaps, the finding of the jury as duly recorded applies to either. Naturally the verdict of the jury in its terms finds the prisoner guilty of an offence which conforms to the definition of English Law, because the directions received by the jury from the Judge were given in the words of English Statute. It seems to me, also, that the jury have, in so many words, found the prisoner guilty of inflicting hurt upon the prosecutor with a knife. This results from the negating of particular intents laid in the several charges, which is effected by the special finding of the jury. For these intents being out of the way, the remaining part of the charges describes so closely an offence defined by Section 324 of the Penal Code, that I cannot say that the small apparent discrepancies make it bad after verdict. Therefore, as I view the record, it exhibits a good conviction, whether under the English Law or under the Penal Code.

18. The only remaining difficulty which has occurred to me, is one regarding the punishment to be awarded. Is it to be that which is directed by English Law, or that of the Penal Code; and, if the former, how is it to be carried out here? Fortunately again, in this particular case, the two melt into one. Section 2 of 12 and 13 Vict., c. 96, provides that the punishment shall be the same as if the matter were tried and adjudged in England, viz., that in this case it must be "imprisonment with hard labour," while the punishment directed by the Penal Code for offences u/s 324, is "rigorous imprisonment." But, further, the 53rd Section of the Penal Code in defining this first-mentioned class of imprisonment says, that it is "rigorous, that is with hard labour. I, therefore, think that a sentence can be passed which shall be legally good, whether the offence be measured by English Law or by the Indian Penal Code.

Macpherson, J.

19. I think the conviction is good, whether the English or the local law applies to the case. The verdict has been given according to English Law, but it is substantially a sufficient finding of an offence under the Indian Penal Code.

20. I am of opinion, however, that the English Law is the law by which the prisoner was triable, and upon that point I concur generally with the Chief Justice. There is no doubt that the English Law was the law which originally applied to offences committed on the high seas on board British ships: and this was continued by the Merchant Shipping Act, 1854. The question is whether by the Amendment Act of 1855 or by the 12 and 13 Vict., c. 96, (extended to this country by 23 and 24 Vict., c. 88) this state of things was changed, and the local

law was substituted for the English. I think it was not. I do not think it can be said, that in either Act there is any thing which distinctly shows an intention to alter the law by which such cases are to be tried, except in matters of mere procedure. But I have no doubt that, under these Statutes, the local procedure is the procedure which is to be followed. Sentence:--Six months" rigorous imprisonment.