

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Our Sovereign Lady the Queen v. Mount and Morris, from the Supreme Court of the Colony of Victoria; delivered 16th March, 1875.*

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Present :

SIR JAMES W. COLVILE.

SIR BARNES PEACOCK.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

THE Respondents (Mount and Morris) were tried at the Sessions of the Supreme Criminal Court of the Colony of Victoria, upon a criminal information for murder committed on board a British ship on the high seas, and were convicted of manslaughter.

The Chief Justice, who tried them, entertaining doubts as to the nature of the sentence which, by law, might be passed, consulted the other Judges of the Supreme Court, who were of opinion that a sentence of penal servitude might be awarded; and, accordingly, at a subsequent Sessions, the Respondents were sentenced to penal servitude for fifteen years.

In pursuance of this sentence the Respondents were first confined in a gaol at Melbourne, being a public gaol within the meaning of the Colonial Act, "The Statute of Gaols, 1864," and were afterwards, under a warrant of the Inspector-General of Penal Establishments, removed to another gaol at Pentridge, being also a public gaol within the meaning of the above Act, there to be detained until the expiration of their sentence, or until discharged or removed by lawful authority.

The Respondents, complaining that their detention in Pentridge Gaol was illegal, obtained a writ of habeas corpus from the Supreme Court of Victoria, to which the Inspector-General made a return as follows :—

“I, George Oliphant Duncan, Inspector-General of Penal Establishments in the Colony of Victoria, do hereby certify and return in obedience to this writ, that before the coming of the said writ to me, to wit, on the 15th day of April, in the year of Our Lord 1873, I did take into custody, and still retain in custody in gaol, the said Henry Clark Mount and William Charles Morris, under and by virtue of a certain sentence of the Supreme Court of General Gaol Delivery, holden at Melbourne on the 19th day of December, in the year of Our Lord 1872, delivered in open Court (the said Court being then sitting) for a certain felony, that is to say, manslaughter on the high seas, whereof the said Henry Clark Mount and William Charles Morris had been by the said Court then and there respectively tried and convicted, which said sentence is that each of them, the said Henry Clark Mount and William Charles Morris, should be kept in penal servitude for the period of fifteen years; and I do further certify that the said Henry Clark Mount and William Charles Morris, are now detained in my custody, for the cause and to the end that they may undergo the sentence aforesaid.

“GEO. O. DUNCAN.”

After hearing arguments upon this return, the Court made an order that the prisoners “be discharged from their imprisonment and set at large,” mainly, as appears from their judgment, on the ground that a sentence of penal servitude cannot be carried out in any gaol in the Colony without the preliminary direction of one of Her Majesty’s Secretaries of State. The judgment on this point concludes as follows :—

“The punishment of transportation could not have been enforced unless the King in Council appointed the places to which offenders were to be transported, nor unless the Secretary of State specified which of the places so appointed each particular offender was to be sent to. (5 Geo. IV, cap. 84, sect. 3.) A sentence of penal servitude, whether passed in the United Kingdom or in a Colony, requires the same preliminary act of a Secretary of State (16 and 17 Vict., cap. 99, sect. 6). Without it the sentence cannot be put into execution. In cases of penal servitude it ascertains the place where the hard labour is to be performed, just as in ordinary cases the sentence of the Court ascertains the gaol in which imprisonment is to be undergone; and although the discipline to which the prisoners are subjected may be, as was urged by the Attorney-General, the same as if the Secretary of State’s direction had been obtained, the imprison-

ment which the prisoners are now undergoing is not in accordance with the sentence passed upon them, nor is it in any way subservient or auxiliary to its execution."

The present Appeal is from the Order discharging the Respondents.

It was not disputed by their Counsel at their Lordship's Bar that the sentence of penal servitude was correct, and their argument was limited to alleged errors in the manner of its execution.

Before, however, dealing with these objections, it will be convenient shortly to consider the statutory law on which the sentence itself is founded.

The jurisdiction to try persons charged with offences committed on the sea within the jurisdiction of the Admiralty, was, for the first time, conferred on Colonial Criminal Courts in 1849, by the Imperial Act (12 and 13 Vict., c. 96). For this purpose it was enacted (section 1) that these Courts should have the same jurisdiction for trying such offences, and be empowered to take and exercise all such proceedings for bringing persons charged therewith to trial, and "for and auxiliary to and consequent upon the trial," as by the law of the Colony might have been taken if the offence had been committed upon any waters within the limits of the Colony.

The second section, which relates to the sentence to be passed in such cases, provides that convicted persons shall be subject to the same punishment as "by any law now in force" persons convicted of the same offence would be liable to in case such offence had been committed, and was "inquired of, tried, and adjudged in England."

The words "now in force" occasioned the doubts entertained by the Chief Justice as to the nature of the sentence to be passed.

At the time this Act passed the punishment for manslaughter in England (under the 9th Geo. IV., c. 51, sec. 9) was transportation for life, or for a term not less than seven years, or imprisonment, with or without hard labour, not exceeding four years, or fine.

In consequence of the difficulty of finding suitable places to which offenders might be transported, penal servitude was substituted in some cases for this punishment by the 16th and 17th Vict. c. 93.

This Act was soon followed by the 20th and 21st Vict., c. 3, which enacted that no person should be sentenced to transportation, and that persons who, if the Act had not passed, might have been sentenced to transportation, should be liable to be sentenced "to be kept in penal servitude."

It could not be disputed that penal servitude would have been a proper sentence if the Respondents had been tried in England, and the doubt thrown upon the validity of such a sentence in the Colony arises upon the question whether the words "now in force," in the 12th and 13th Vict., c. 96, allow of the application in the Colonies of the punishment substituted in England for that in force when the Act passed.

On this question their Lordships think that, although the Imperial Act abolishing transportation does not in terms include the Colonies, it is applicable to them with respect to the sentences to be passed on persons convicted in the Colonies of offences only triable there by virtue of the Admiralty jurisdiction conferred by the Imperial Act on Colonial Courts. Such offences might be tried, after that Act, either in England or the Colonies, and the Legislature clearly expressed its intention that the punishment should be the same, wherever the trial might take place. This general intent and policy should, therefore, govern the construction of the Acts, unless it plainly appears from the language of the later Statute that the Legislature meant to change it.

The words "now in force," in the original Act, no doubt apply in terms to the existing law. But the latter part of the section, directing that the punishment should be the same as it would have been if the offence "were inquired of, tried, and adjudged in England," show with distinctness that the Imperial Legislature was conferring power upon the Colonies to try offences properly cognizable in England, with the consequences which would have attended a trial there. The punishment was accordingly directed to be the same as it would have been by the existing law if the offence had been tried in England.

When the Imperial Legislature altered that law, and substituted penal servitude for transportation, it is reasonable to suppose that the alteration was

intended to embrace sentences for offences tried in the Colonies under the special jurisdiction conferred by the 12th and 13th Vict., since there is no trace of any intention on the part of the Legislature to change the policy of that Act, which orders these sentences to be passed according to the law of England.

This construction creates no conflict between Imperial and Colonial Authority, and in no way affects the rights and privileges of the Colonial Legislatures. It simply affirms that the Imperial Statute which gave the Courts of the Colonies, *quoad* offences committed upon the seas beyond their territorial limits, a jurisdiction which their own Legislatures could not confer, was altered by a subsequent Imperial Act.

Their Lordships therefore see no reason for disagreeing with the Judges who advised the Chief Justice that a sentence of penal servitude might be passed upon the Respondents.

The only question argued at the bar, on behalf of the Respondents, related to the manner of executing this sentence in the Colony, and must now be considered.

At the passing of the Act conferring Admiralty jurisdiction on the Colonies (12 & 13 Vict.), the punishment for manslaughter, according to English law, was, as already stated, transportation, or imprisonment with hard labour for four years.

The 17th section of the Imperial Act (5 Geo. IV, c. 84), which consolidates the earlier Acts relating to transportation, recognized the power, then existing in some Colonies, to transport offenders; and by the 4th section of the Imperial Act, passed in the following year (6 Geo. IV, c. 69), the King was empowered, by an Order in Council, to authorize Governors of Colonies to appoint places to which offenders sentenced in the Colonies to transportation should be sent.

The Colonial Acts of New South Wales, which then included Victoria (afterwards made applicable to the new Colony by the 14th Vict., No. 49), show that an Order in Council was issued by the King under the last-mentioned Statute, and that provision was made by the Colonial Legislature for carrying sentences of transportation into execution. (See 7th Geo. IV, No. 5; 11th Geo. IV, No. 12; 3rd Wm. IV, No. 3.)

But the same difficulty of carrying into execution sentences of transportation was experienced in the Colonies as existed in England, and accordingly by the New South Wales Act (11th Vict., c. 34), it was enacted, whilst continuing the sentence of transportation, that in lieu thereof offenders might be sentenced to be kept to hard labour on roads or public works.

Such was the state of the Colonial law relating to transportation when the Admiralty jurisdiction to try offenders was conferred on Colonial Courts (12th and 13th Victoria), and there would seem to be no sufficient reason for saying, if a sentence of transportation had then been awarded in the Colony, that its execution should have been transferred to the English authorities. The direction in the Act that the punishment should be the same as if the trial had been in England is satisfied by holding that the nature of the sentence must be the same. It could hardly have been intended, if the sentence were imprisonment, that the offender should be sent to England to be confined in an English gaol; or that the provisions relating to transportation from England, which include power to imprison in English gaols, (see 5th Geo. IV, c. 84, secs. 18, 19) should be put in force.

When the law of England abolished transportation, and substituted for it penal servitude, the latter, as already stated, became a sentence which might be lawfully passed by the Colonial Courts when acting under their Admiralty criminal jurisdiction.

The argument for the Respondent came to this: that there being no such punishment as "penal servitude," *eo nomine*, in Victoria, such a sentence could be carried into execution only in accordance with the disciplinary regulations of the English Statutes, and if those regulations were not applicable, that it could not be carried into effect at all.

It was said that the 6th clause of the Imperial Act (16th and 17th Vict.), which for the first time introduced penal servitude as a substitute for transportation, was applicable to Colonial sentences. This section enacts that persons sentenced to penal servitude may be confined in such prison or place in the United Kingdom or in Her Majesty's dominions beyond seas, as a Secretary of State may direct.

The Supreme Court yielded to this contention, and held that without a preliminary order of a Secretary of State appointing the prison or place where the labour was to be performed, the sentence could not be put into execution.

The question is not free from difficulty; but their Lordships, on the whole, think that the directions in the 6th clause form no part of the sentence. They are not contained in the section of the Act defining the nature of the sentence, nor are they embodied in it when judicially pronounced. It appears to them that these provisions relate only to the manner of its execution and to matters of administration, and therefore need not be resorted to in the case of sentences passed in the Colonies, which, in their view, may be carried into effect in accordance with the procedure provided by them.

It is then said that no legislative provision has been made in the Colony for executing this sentence. Supposing this were so, and that a sentence of penal servitude had been absolutely new in the Colony, it could by no means follow after the Imperial Legislature had directed such a sentence to be awarded, that, when passed, it might be treated as null, because no means had previously been provided there for carrying it into effect.

But, on behalf of the Attorney-General, it is urged that means do exist in the Colony for executing an analogous sentence, which are adapted to executing that of penal servitude.

The Imperial Act, which substitutes penal servitude for transportation, defines or describes the sentence only by the following terms: that the offender "be kept in penal servitude;" "kept," of course, implies detention, and "penal servitude" compulsory labour. This, then, is the nature of the sentence.

The Colonial Act 11th Vict., c. 34, provides that in lieu of transportation offenders may be sentenced to be kept to hard labour on roads or public works; and now, by the Criminal Law Consolidation Act, 27th Vict., No. 233, transportation is virtually abolished in the Colony, and detention and keeping to hard labour on public works at places to be appointed for that purpose is substituted for it (s. 291).

By the "Statute of Gaols, 1864," the Governor in Council may appoint places in Victoria at which

offenders under such a sentence of detention shall be detained and kept to hard labour (sec. 4), and it is directed that all gaols and hulks shall be under the charge and direction of the Sheriff, or such other officer as the Governor may appoint (sec. 8). By a later Act (The Statute of Gaols Amendment Act, 1871) the 8th section of the former Act is repealed, and the Governor in Council is empowered to appoint an Inspector-General of Penal Establishments, who was to have the charge and direction of all gaols and hulks, with power to remove prisoners under sentence from one gaol to another. This statutory officer was invested with the powers which before belonged to the Sheriff.

Moreover, by a recent Imperial statute, "The Colonial Prisoners Removal Act, 1869," which in effect authorizes inter-colonial transportation, it is enacted that prisoners "under sentence of transportation, imprisonment, or penal servitude," may be removed under certain conditions and regulations, and by agreement between any two Colonies, from one Colony to the other, for the purpose of undergoing their sentence in the other Colony. This statute recognizes "penal servitude" as a punishment existing in, at least, some Colonies, and places it in the same category with "transportation and imprisonment."

In the result, it appears to their Lordships upon a review of the above-mentioned Acts of the Imperial and Colonial Legislatures, that sentences of penal servitude, in other words, of detention and compulsory service, may be carried into execution in the Colony; and, therefore, that the Return of the Inspector-General that he detained the Respondents by virtue of the sentence passed upon their conviction "for the cause and to the end that they may undergo such sentence," is sufficient.

But if this were not so, and if the Judges of the Supreme Court were right in holding that an order of the Secretary of State was necessary, their Lordships think they erred in setting the prisoners at large. In any event, some time must have elapsed after the sentence had been passed before such an order could be obtained, during which the prisoners must have been necessarily detained by the Inspector-General, as the statutory Sheriff; and in any view of the case, the Court



should, in their opinion, have remanded the prisoners to his custody, to give the opportunity for an application to the Secretary of State for the order the Court thought necessary. The prisoners who had been convicted of felony, ought not to have been set at large during the term of their sentence, until it was clear that no lawful means of executing it could be found. (*Ex parte Krans*, 1 B. & C., 258, *Parker's Case*, 5 M. & W. 32).

The case of *R. v. Allen* (3 A. & E.) was exceptional in its circumstances; the prisoner had been tried by a Court Martial in India, and when he had been brought to England under an invalid warrant, there seemed to be no lawful way of carrying the sentence into effect.

For these reasons their Lordships will humbly advise Her Majesty to reverse the order under Appeal.

