[CRIMINAL JURISDICTION.]

1891
July 27.

CROWN CASES RESERVED.

THE QUEEN *v.* BUDHU.

Crown Cases Reserved—Escaping from Gaol—14 & 15 *Vict. c.* 100, *s.* 29—*Prisons Ordinance* 1884, *s.* 18—*Proclamation of gaol.*

A stipendiary magistrate has only authority to send a prisoner to undergo his sentence to a proper gaol. If, therefore, a prisoner escapes from a place of confinement which under the Prisons Ordinance 1884 had not been properly constituted a prison at the time of his escaping therefrom he cannot be convicted of the offence of escaping from gaol or from lawful custody.

This was a case in which the accused, an indentured Indian labourer, had been charged at the recent criminal sessions with having escaped from lawful custody. It appeared that he had been committed to Namosau gaol, to serve a short period of imprisonment for desertion, under the warrant of the then acting stipendiary magistrate for Ba; and whilst serving his time, viz., on the 22nd September, 1890, made his escape from the prison and had only recently been recaptured. He was at first committed for trial for having escaped from prison, under the Prisons Ordinance 1884, s. 18,* which

* S. 18 is as follows:—

"Every person lawfully imprisoned for any crime or offence by the sentence of any Court of competent jurisdiction or employed at labour as a criminal on public works or otherwise or imprisoned to await trial or in the course of removal as a prisoner under the powers contained in this Ordinance who escapes or attempts to escape from any prison or from any place where he is lawfully employed as a prisoner or from the custody of any constable gaoler or other officer or person,

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makes the offence a felony, and was indicted for that offence. It having, however, subsequently transpired that Namosau gaol had not been proclaimed as a prison as required by that Ordinance until after the prisoner had escaped, viz., on the 4th November, 1890, the Attorney-General offered no evidence against him on that indictment and he was acquitted on that charge. Another indictment, however, was preferred against the prisoner, under s. 29 of the Imperial Statute 14 & 15 Vict. c. 10, for escaping from lawful custody, which makes that offence a misdemeanour. His Honour, however, being of opinion that the same objection existed with regard to that indictment, the Court made a special finding that the prisoner had, as a matter of fact, escaped from the building usually known as Namosau gaol, and reserved the point for further consideration whether, under the circumstances, the prisoner had been lawfully detained in custody in that building.

The case came on for argument on 27th July last, when the Attorney-General (Mr. Udal) on behalf of the Crown (the prisoner being unrepresented by counsel) contended that although it must be admitted that the absence of any evidence that Namosau gaol had been proclaimed as a prison as required by the Prisons Ordinance 1884 before the prisoner had escaped from it would be fatal to any indictment brought under the

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in whose custody he may be, shall be guilty of felony and upon conviction thereof may be sentenced to penal servitude for any period not exceeding five years or to be imprisoned for any period not exceeding two years with or without hard labour and shall also be liable to corporal punishment if the Court shall so order. The term of any sentence of penal servitude or imprisonment awarded under this section shall be in addition to any term of penal servitude or imprisonment which may be pending at the time of such escape or attempt to escape."

Prisons Ordinance 1884 for escaping from prison, yet still the prisoner might nevertheless be indicted under the Imperial Statute 14 & 15 Vict. c. 100, s. 29, for escaping from lawful custody on a criminal charge. He referred to Stephen's *Digest of Criminal Law*, Art. 152, which states that it is a misdemeanour for any one when lawfully in custody for a criminal offence to escape from that custody; and argued that inasmuch as by s. 58 of the Imperial Prisons Act, 1865, followed by s. 5 of the Prisons Ordinance 1884, every prisoner is deemed to be in the legal custody of the gaoler, the keeper of the gaol (which includes all places of confinement) on receipt of the prisoner under the magistrate's warrant for a criminal offence was justified in keeping the prisoner in custody at Namosau, notwithstanding the fact that the gaol there had not at that time been proclaimed as a public prison under the local Ordinance. He also referred to the statute of 1 Edward II. as to what a prison was, and to Russell on *Crimes*, vol. i., p. 592, and contended that the prisoner having been committed to the custody of the gaoler for safe keeping for a criminal offence and having escaped from that custody, could be properly convicted under the present indictment.

H. S. BERKELEY, C.J. The question to be decided is whether at the time of the escape from the so-called gaol at Namosau the prisoner was in the lawful custody of the person described as the keeper of the gaol at Namosau. As a matter of fact the prisoner had been in confinement for some days in buildings called Namosau gaol, and had escaped therefrom. He had been sent there by the stipendiary magistrate for a month's imprisonment for desertion; and the warrant is addressed to

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the keeper as gaoler of Namosau. On the face of that the keeper would be authorised to receive him and keep him to hard labour. The question then is had the magistrate authority to send the prisoner there, because if he had this power then no doubt the prisoner was in lawful custody. A stipendiary magistrate has only authority to send a prisoner to a proper goal, and if it were not a properly constituted prison the warrant could convey no authority. If the argument for the prosecution was right, any stipendiary magistrate can select his own place of confinement irrespective as to whether it was or was not legally a prison. That is directly opposed to the fundamental principle that a prison can only be established by the Legislature, which is the only power that can constitute a prison. [His Honour referred to Stephen's *Commentaries*, vol. iii., p. 233, 6th ed.] It was admitted that at the time the gaol at Namosau had not been so constituted by the Legislative Council. It follows, therefore, that the stipendiary magistrate had no power to send the prisoner to Namosau gaol or to send him to the custody of the gaoler, and that as the prisoner's commitment was not lawful his escape was not unlawful. No person can be imprisoned and kept to hard labour except in a place legally constituted a prison by the Legislature. The Governor has power under the Prisons Ordinance 1884 to do this by proclamation, but this had not been done in the case of Namosau at the time of the prisoner's escape therefrom, and he was therefore not in lawful custody and must be acquitted on the present indictment.

Order made accordingly.