REG *v.* BUDHU.

[Criminal Jurisdiction (Berkeley, C.J.) July 17, 1891.]

Escape from Lawful custody—prisoner sent to serve sentence at a place not proclaimed to be a prison—acquittal on charge of escaping from prison under Prisons Ordinances 1884, *s.* 18[1]*—whether guilty of escaping from lawful custody under the Criminal Procedure Act,* 1851, 14 *and* 15 *Vict. c.* 100, *s.* 29.

This was a case in which the accused, an indentured Indian labourer, had been charged at the 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 prison, under the Prisons Ordinance 1884, s. 18,[1] which was 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 the gaoler or "other officer or person 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 of imprisonment which may be pending at the time "of such or attempt to escape."

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 and 15 Vict. c. 100 (Criminal Procedure Act, 1851), 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.

HELD.—As the prisoner's commitment was not lawful his escape was not unlawful.

[**EDITORIAL NOTE.**—Escaping from lawful custody is now a misdemeanour contrary to s. 123 of the Penal Code (Cap. 5) (Revised Edition, Vol. I, p. 159). By s. 14 of the Prisons Ordinance (Cap. 48) (Revised Edition Vol. I p. 634) all prisoners are deemed to be in the custody of the Superintendent in charge appointed to the prison in which they are confined. The Prisons Ordinance does not create the offence of s. 18 of the repealed Ordinance of 1884.]

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[1] *Repealed.*

PROSECUTION for escaping from lawful custody. Decision on special finding of fact.

The Attorney-General, *J. S. Udal*, for the Crown (the prisoner being unrepresented by counsel) contended that, although it must be admitted that in 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 Prisons Ordinance 1884 for escaping from prison, yet the prisoner might nevertheless be indicted under the Imperial Statute 14 and 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, 28 and 29 Vict., c. 126, followed by s. 5 of the Prisons Ordinance 1884[1] 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[2] 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.

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 the keeper as gaoler of Namosau. On the face of that the keeper would be authorized 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 has only authority to send a prisoner to a proper gaol, 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

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[1] *Rep. Vide Prisons Ordinance, Revised Edition, Cap. 48, s. 14.*

[2] *The Statute of Breaking Prisons, 1295, 23 Edw. I attributed sometimes to 1 Edw. II (Vide Halsbury's Statutes, Vol. XIII, p. 252).*

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 Iegislature. 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.

RECEIVER-GENERAL *ats.* BRODZIAK & COMPANY.

[Appellate Jurisdiction (Berkeley, C.J.) November 22, 1894.]

Forfeiture of dutiable goods—Customs Ordinance 1881 *ss.* 90, 100—*whether the magistrate has a discretion as to ordering forfeiture.*

In a prosecution for an offence against s. 90 of the Customs Ordinance, 1881,[1] the prosecution applied for an order for forfeiture of the goods concerned. The Chief Police Mgistrate at Suva refused the order, setting out his reasons in the following stated case :—

"In this case, the defendants. A. M. Brodziak & Co., are charged with that they did on "the 12th day of May last, unlawfully import certain quantities of tobacco in a package "containing other goods contrary to the provisions of s. 90[1] of Ordinance XVI of 1881, and "the Receiver-General, in whose name the prosecution is brought, now asks this Court to "make an order forfeiting the goods in question. There is no dispute as to the facts in this "case. It is proved and admitted that the tobacco, some 80 lbs in weight, was brought to "this Colony in a case containing other goods in contravention of the provisions of s. 90[1] of "the Customs Ordinance. The learned counsel for the prosecution argues that, the facts "being proved, the Court has no discretionary power to make any order other than one for "forfeiture under s. 90[1] sub-s. 4 and s. 100[2] and in support of this contention argues that "the goods enumerated in s. 90[1] are prohibited by law to be imported ".

"For the defence it is urged—(1) That there being no proof of fraud or attempted fraud, "nor even an insinuation or suggestion of fraud, nor any attempt to evade the duties on the "part of the defendants, they cannot be made *particeps criminis* and punished for the fault "of the firm in Calcutta who shipped the Tobacco without orders. (2) That under s. 100 the "Court has power to make such an order as the circumstances require. That the order of "forfeiture is not compulsory but discretionary, and should be made to meet the ends of "justice, and in accordance with the merits of the case and, in support, quotes the judgment "of his Honour Chief Justice Berkeley in the appeal case of *A. M. Broadziak & Co.*, appellants, "and the *Receiver-General,* respondent, decided in the Supreme Court on 14th June, 1887.

"The question I have to decide is whether, under s. 90 sub-s. 4[1] and s. 100,[2] I am com- "pelled to order the forfeiture of the goods or whether I can make such order as the "circumstances require.

"I do not agree with the counsel for the prosecution that tobacco comes under one of the "prohibitions described by s. 90[1]. The sections reads, 'The goods enumerated and described "in the following table of prohibitions and restrictions.' As I read the section tobacco is not "one of the class of goods prohibited to be imported like counterfeit coin, or obscene books "or prints, but tobacco may be imported under certain restrictions. (1) that it must be more "than 40 lbs. in weight. (2) that it must be packed by itself and not with other goods. In "this case the weight imported is in excess of the minimum required by law ; thus the "only restriction evaded is that the tobacco was packed in the same case with other goods, "and to me appears to be similar to an evasion of the restriction required by s. 77[3] which "also carries forfeiture of the goods.

"After reading the judgment of his Honour the Chief Justice in the case of *A. M.* "*Broadziak & Co.,* appellants, and the *Receiver-General,* respondent, as to the legal interpreta- "tion of s. 100, I am clearly of opinion that I have the power and I am required by law "to make such an order as will, in my opinion (based on the facts elicited by the evidence), "meet the circumstances of the case.

"In this case I do not think there are any grounds for believing there was any intention on "the part of the defendants to defraud the Customs, no attempt was made to prove such "intent, in fact the learned counsel for the prosecution stated that he made no suggestion of

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[1] *Vide Customs Ordinance* (*Cap.* 147) *s.* 117 (*Revised Edition, Vol.* II, *p.* 1530).
[2] *Vide Customs Ordinance* (*Cap.* 147) *s.* 147 (*Revised Edition, Vol.* II, *p.* 1540).
[3] *Vide Customs Ordinance* (*Cap.* 147), *s.* 104 (*Revised Edition, Vol.* II, *p.* 1526).