(1868) 03 CAL CK 0005

Calcutta High Court

Case No: None

Nassir		APPELLANT
	Vs	
Chunder and Others		RESPONDENT

Date of Decision: March 12, 1868

Judgement

Macpherson, J.

This case has been sent to a Full Bench by a Division Court, before whom it came when sitting as a Court of Revision. As we, unfortunately, do not agree in the view we take of the point referred, it becomes necessary for me to express my opinion first. The question is what is the maximum of punishment to which a Magistrate of a district can legally sentence a person convicted at one time of two or more offences punishable under the same or different sections of the Indian Penal Code?

2. S. 46 of the Criminal Procedure Code enacts that it shall be lawful for the Court to sentence such person for the offences of which be shall have been convicted to the several penalties prescribed by the Indian Penal Code, which such Court is competent to inflict; "such penalties, when consisting of imprisonment, to commence the one after the expiration of the other.....Provided that, if the case be tried by a Magistrate, the punishment shall not in the aggregate exceed twice the extent of punishment which such Magistrate is, by his ordinary jurisdiction, competent to inflict." S. 22 prescribes the extent of punishment which a Magistrate was, at the time of the passing of Act XXV of 1861, by his ordinary jurisdiction, competent to inflict,-- "imprisonment of either description not exceeding the term of two years, including such solitary confinement as is authorized by law, or fine to the extent of Rs. 1,000, or both imprisonment and fine in all cases in which both punishments are authorized by the Indian Penal Code."

3. When the Code of Criminal Procedure became law, whipping was not a punishment which could be awarded under the Penal Code. Subsequently, however, Act VI of 1864 was passed, and the punishment of whipping was thereby authorized in certain cases. The question arises whether, in cases in which whipping may be

awarded under Act VI of 1864, whipping can be said to be one of the penalties prescribed by the Indian Penal Code, which the Magistrate is competent to inflict within the meaning of s. 46 of the Criminal Procedure Code?

4. I think it is one of these penalties. The preamble of Act VI of 1864 declares that "it is expedient that in certain cases offenders should be liable, under the provisions of the Indian Penal Code, to the punishment of whipping;" and s. 1 declares that, "in addition to the punishments described in s. 53 of the Indian Penal Code, offenders tire also liable to whipping under the provisions of the said Code." Reading the preamble and this 1st section together, it appears to me that their effect is this,--that s. 53 of the Indian Penal Code must be read as if whipping were mentioned in it as one of the punishments to which offenders are liable under the provisions of the Code, and that all whipping under Act VI of 1864 is to he deemed to be whipping under the provisions of the Indian Penal Code. The Whipping Act is not very clearly expressed. But this appears to me the only meaning that can be attached to the words "under the provisions of the Indian Penal Code," which occur in the preamble and the 1st section.

5. The 2nd section specifies the offences for which whipping may be awarded in lieu of any other punishment. It is as follows:-- "Whoever commits any of the following offences may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the Indian Penal Code, that is to say," &c. The effect of these words I understand to be that the sections mentioned in this 2nd section are to be read respectively as if words to this effect had been added to each, "or in lieu of such punishment (or punishments), the offender may be punished with whipping." It is argued that as this 2nd section says that whipping is to be in lieu of any punishment to which the convict may be liable under the Indian Penal Code, it is clear that the whipping itself cannot be under the Indian Penal Code. But it appears to me that "any punishment" must be read as "any other punishment:" and that this was the intention of the framers of the Act is shown by s. 3, in which, under precisely similar circumstances, the word "other" occurs. Moreover, I have said that I consider that by reason of the preamble and the 1st section, all whipping under Act VI of 1864 is to be deemed to be whipping under the Penal Code; and, if I am right in that opinion, then the whipping under s. 2, as well as under the other sections of the Act, must be deemed to be under the provisions of the Penal Code. On the whole, I think that whipping is one of the penalties prescribed by the Penal Code within the meaning of s. 46 of the Criminal Procedure Code.

6. Then is it a punishment which a Magistrate is competent to inflict? At first I had doubts on this point, the powers of a Magistrate being defined in s. 22, and whipping not being one of the punishments there mentioned. But it appears from s. 8 of Act VI of 1864, that a Magistrate of a district has the power to punish with whipping; for, unless the Magistrate was intended to have that power, it would have been quite unnecessary to enact that "no sentence of whipping shall be passed by

any officer inferior to a Subordinate Magistrate of the first class, unless he shall have been expressly empowered by the Local Government to pass sentences of whipping." The exclusion of inferior Magistrates from the exercise of the power would seem to import the possession of the power by superior Magistrates. As a Magistrate may pass a sentence of whipping, and as a sentence of whipping under Act VI of 1864 is to be deemed a sentence passed under the provisions of the Penal Code, I think, further, that whipping is a punishment which a Magistrate is (in the words of s. 46), "by his ordinary jurisdiction, competent to inflict;" that is to say, I think that a Magistrate is, by his ordinary jurisdiction, competent to sentence not only to the punishments mentioned in s. 22 of the Criminal Procedure Code, but also to whipping, either as the only punishment, or as an additional punishment, as provided in Act VI of 1864.

7. What, then, is the greatest amount of punishment which a Magistrate can award without exceeding "twice the extent of punishment which he is, by his ordinary jurisdiction, competent to inflict?" There is no doubt that in cases of convictions at the same time of two or more offences punishable by imprisonment and fine, the Magistrate has power to sentence, in the whole, to four year''s imprisonment and fine, with one year''s additional imprisonment if the fines are not paid. But it is more difficult to say what is the limit in cases in which whipping has been awarded.

8. According to the literal interpretation of s. 46 of the Criminal Procedure Code, a Magistrate (in the view I take of his powers) might sentence, upon several convictions at the same time, to four years'' imprisonment with fine, and another year''s imprisonment in lieu of payment, and two whippings: for s. 46 says only that "the punishment shall not in the aggregate exceed twice the extent of punishment which such Magistrate is, by his ordinary jurisdiction, competent to inflict." But these words of s. 46 must be read with the provisions of Act VI of 1864; and under that Act it appears to me that in no case can more than one sentence of whipping be passed. Such a thing as double whipping is not contemplated by Act VI of 1864. This appears to me from the general tenor of the whole Act, and is shown more especially by the 9th, 10th, and 11th Sections, which provide that, when whipping is awarded in addition to imprisonment, the whipping shall he inflicted immediately on the expiry of fifteen days from the date of the sentence, or (in the case of an appeal having been made) immediately on the receipt of the order of the High Court confirming the sentence, that "in no case, if the cat-of-nine-tails be the instrument employed, shall the punishment of whipping exceed one hundred and fifty lashes, or, if the rattan be employed, shall the punishment exceed thirty stripes," and that "no sentence shall be executed by installments." With these provisions in the Act, and in the absence of any indication of an intention that a man should be liable to be sentenced at one time to more than one whipping, I am of opinion that under s. 46 only one whipping can be awarded.

9. But although I think a Magistrate would be acting within the letter of the law in passing a sentence, amounting in all to four years'' imprisonment with whipping, and a fine of Rs. 1,000, or an additional period of imprisonment for one year, in my opinion he would not exercise his discretion wisely in passing such a sentence on any person who had not previously been convicted of the like offence. For it may be very much doubted whether it was the intention of the Legislature to authorize whipping in the case of a second offence, except when the ordinary punishment had been tried and failed; or, in the case of a first offence, if whipping was to be accompanied by imprisonment under a simultaneous sentence. The punishment of whipping for a first offence is one which recommends itself not only from its deterrent qualities, but from this, that it does not expose the offender to the risk of contamination and demoralization, which he necessarily incurs if sent to prison. The latter object is defeated, if one who has not previously been convicted (using the term in the sense of being convicted before the commission of the offence for which he is about to be punished) is sentenced to imprisonment as well as whipping.

10. The Whipping Act is one in the construction and currying out of which many very difficult questions arise: and it is impossible to warn Magistrates and other officers sufficiently strongly to be cautious and moderate in acting under it. In no case can a Magistrate be justified in passing a sentence of whipping, if he has any doubt as to his legal competency to do so.

11. The answer which I would give to the question put to us is:--A Magistrate is competent to sentence a person convicted at one time of two or more offences punishable under the same or different sections of the Indian Penal Code to imprisonment for four years with whipping, and to fine amounting to Rs. 1,000, or, in default of payment, to a further period of imprisonment not exceeding one year. This would be the maximum aggregate punishment which any Magistrate could pass under s. 46 of the Criminal Procedure Code.

Phear, J.

12. The punishment of whipping is given by Act VI of 1864. It seems to me, upon consideration of the preamble and the words of the 1st section, that the Legislature in passing that Act intended to make the punishment of whipping to be read thenceforth as if it had been included among the punishments prescribed by the Indian Penal Code.

13. The preamble is in these words:-- "Whereas it is expedient that, in certain cases, offenders should be liable, under the provisions of the Indian Penal Code, to the punishment of whipping; it is enacted as follows:" S. 1 enacted that, "in addition to the punishments described in s. 53 of the Indian Penal Code, offenders are also liable to whipping under the provisions of the said Code." S. 8 of the same Act also seems to me by implication to give power to a Magistrate to pass sentences of whipping. "No sentence of whipping," it says, "shall be passed by any officer inferior

to a Subordinate Magistrate of the first class, unless lie shall have been expressly empowered by the Local Government to pass sentences of whipping." I cannot escape from the conclusion, that Act VI of 1864 intends to insert in the Penal Code, among the punishments therein prescribed, the punishment of whipping, and also to empower a Magistrate to pass sentences of whipping.

14. But this Act does not authorize a Magistrate to pass, simultaneously, several sentences which shall take effect in succession to one another. That provision is given solely by the Code of Criminal Procedure. The 46th section of that Act says:-- "When a person shall be convicted at one time of two or more offences punishable under the same or different sections of the Indian Penal Code, it shall be lawful for the Court to sentence such person for the offences of which he shall have been convicted to the several penalties prescribed by the said Code, which such Court is competent to inflict; such penalties, when consisting of imprisonment, to commence the one after the expiration of the other. It shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which such Court is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court. Provided that in no case shall the person be sentenced to imprisonment for a longer period than fourteen years; and provided also, that, if the case be tried by a Magistrate, the punishment shall not in the aggregate exceed twice the extent of punishment which such Magistrate is, by his ordinary jurisdiction, competent to inflict."

15. I think that a Magistrate has no power to inflict a succession of punishments, except under the provisions of this s. 46 of the Code of Criminal Procedure. It is, therefore, necessary to consider what are the sentences which that section authorizes a Magistrate to pass to take effect in succession. It is clear that, unless this Act has been altered by subsequent legislation, the different penalties of the Indian Penal Code to which this section refers, are the penalties prescribed by that Code at the time that the Criminal Procedure Act was passed. It is also clear that the proviso at the end of the section, unless similarly altered by subsequent legislation, means now, as it meant when it was passed, in referring to the ordinary jurisdiction of the Magistrate, the ordinary jurisdiction such as it then existed.

16. I believe there is no contention, but that the ordinary jurisdiction of the Magistrate as it then existed is that which is mentioned in s. 22 of the Code of Criminal Procedure, viz., that he may inflict imprisonment up to a term of two years with a fine commutable to imprisonment for six months; so that it appears to me, unless s. 46 of this Act has been altered by subsequent legislation, the Magistrate, while he has power of passing sentences simultaneously to take effect in succession the one to the other, can only in such accumulated sentences give the penalties which were prescribed by the Penal Code as it existed at the time of the passing of the Criminal Procedure Act; and that he was then limited in the aggregate to a term of four years imprisonment, with two fines commutable into six months''

imprisonment each, or twelve months'' in the whole. Now it is not suggested that the meaning of s. 46 of the Criminal Procedure has been changed by the Legislature otherwise than by the passing of the Whipping Act, as it is termed, or Act VI of 1864. But I am unable to find anything in Act VI which goes the length of effecting such a change. When the Legislature by that Act inserted the punishment of whipping into the Penal Code for the general purposes of that Code, it did not, as it seems to me, intend to alter the meaning or scope of any other existing Act of the Legislature. No doubt this Act gave powers which no previous Act gave, but, excepting the Penal Code, it did not make any other Act utter language which it did not utter before. If the Legislature had, when passing it, intended to do this, it could have done so expressly. It clearly to my mind has not expressly done it: and I do not think that there is any such necessity arising out of the provisions of Act VI of 1864 (remembering that it is a penal Act) as to make us come to the conclusion that such a change was effected by implication.

17. On the whole, therefore, it seems to me that, if a Magistrate exercises the powers which are given to him by s. 46 of the Criminal Procedure Code, and passes an accumulated sentence, he must confine himself to the penalties prescribed by the Penal Code before it was altered by Act VI of 1864. He cannot include in that sentence the punishment of whipping, and he cannot exceed in the total twice the extent of his ordinary jurisdiction as defined by s. 22 of the Criminal Procedure Code.

Jackson, J.

18. I have arrived at the same conclusion as my colleague Macpherson, J., and generally for the same reasons.

19. It is remarkable enough that Act VI of 1864, which legalizes the punishment of whipping, is expressly designed by its terms to become, I may say, a portion of the Indian Penal Code, but contains no reference whatever, from first to last, to the Code of Criminal Procedure. If the result of that omission were that neither the Criminal Procedure Code, nor any other Act, except the Indian Penal Code, were altered or affected by the provisions of Act VI of 1864, it seems to me that the result would be that no officer or any Court whatever would be competent to inflict the punishment of whipping: because if s. 22 of the Criminal Procedure Code were unaffected by the terms of Act VI of 1864, the several Courts and officers therein enumerated would still be bound by the limits of punishment laid down in that section, and would have no authority to go beyond those limits by awarding a sentence of whipping.

20. But, looking to the terms of s. 8 of Act VI of 1864, it appears to me that the Legislature intended to invest, and did invest, all officers not inferior to a Subordinate Magistrate of the first class with the power of passing sentences of whipping, and that it reserved to the Local Government the power of authorizing

inferior Magistrates also to exercise the like power. The result, therefore, of the amalgamation, so to say, of the Whipping Act with the Indian Penal Code, and of the operation of that Act upon the Code of Criminal Procedure, will be in my opinion, to insert in s. 53 the punishment of whipping as one of those to which offenders are liable under the provisions of the Code; to insert in the several sections of the Penal Code enumerated in ss. 2, 3 and 4 of the Whipping Act, the punishment of whipping as a punishment to which a person committing the offences described in the respective sections, will be liable, either in lieu of another punishment or in addition to the other punishment, as the case may be; also to add to s. 22 of the Code of Criminal Procedure the punishment of whipping as included within the ordinary jurisdiction of the Court of Sessions, of the Magistrate of the district, and of Subordinate Magistrates of the first class without condition, and Subordinate Magistrates of the second class when expressly empowered by the Local Government as punishments each was competent to inflict; and lastly, to introduce into the Schedule annexed to the Code of Criminal Procedure, in the column of punishments, that of whipping, in the several cases and under the respective conditions which are prescribed by the Whipping Act. That being so, and the limit of the ordinary jurisdiction of the Magistrates being enlarged to the extent I have said, it seems to me to follow that in the case of more than two convictions of the offences specified in s. 2 of the Whipping Act, a Magistrate would be within the strict letter of the law, if he passed sentence of punishment not exceeding four years'' imprisonment, with fine as permitted by s. 22, and whipping not exceeding thirty stripes, if inflicted with the rattan; for it appears to me that, in that respect also, there is a modification of s. 46 of the Code of Criminal Procedure in respect of this, that it would not be lawful for the Magistrate, or for any Court, to sentence an offender, no matter how many offences he might be convicted of, to more than thirty stripes, if the rattan be the instrument of punishment. This is the conclusion at which I have arrived after careful consideration of the subject; and I only add that I entirely concur in the observations of my colleague Macpherson, J., both as to the very numerous and difficult questions of construction presented by the Whipping Act, and also as to the extreme caution which it behaves Magistrates and Courts of Justice to employ when putting in force the provisions of that Act.
Seton-Karr, J.

21. There is no doubt, as has been very justly remarked by my learned colleagues who have preceded me, that there are several questions of nicety and difficulty arising in the construction of what is known as the Whipping Act.

22. On the whole, I am inclined, substantially, to agree with the conclusions arrived at by Campbell, J., to be found in the printed papers furnished to us for this reference, which conclusions are dated the 24th of September 1866. The judgment is quoted in the margin [5].

23. But of course it becomes necessary for me to state more particularly what my conclusions are. I deem it unnecessary to set out at length the various sections which have been already quoted by my learned colleagues.

24. The first conclusion at which I have arrived is, that by s. 1 of Act VI of 1864, whipping is added to s. 53 of the Indian Penal Code, and that it thereby becomes a seventh punishment, which officers dealing with that Code are empowered to administer.

25. Then comes the difficulty which has been already pointed out, viz., that the Whipping Act contains no reference to, or mention whatever of, the Code of Criminal Procedure, and yet that the Magistrate ought to be held to administer the Code of Criminal Procedure when he administers the Whipping Act. I cannot myself doubt that when a Magistrate administers any of the punishments defined in the Penal Code with the Whipping Act added to it, he does, at the same time, administer, and is bound by, the Code of Criminal Procedure. I do not think that he administers whipping under Act VI of 1864 alone, and not under the Criminal Procedure Code.

26. But when we come to look at s. 46 of that Code, which is a very important section, altering, as I believe it does, the old criminal law of the country as formerly administered, and empowering Magistrates, in certain cases and with certain restrictions, to give cumulative punishments, I do not think that we are justified in applying that particular section to the punishment of whipping, which can or may be administered by Act VI of 1864. I think that an express mention of this s. 46 would be necessary in Act VI of 1864 to enable a Magistrate to make whipping cumulative for first offences; and without such a distinct proviso, I shrink from holding that offenders can be whipped and imprisoned for such first offences.

27. I do not lose sight of the difficulty which arises if we lay it down that the Magistrate does administer the Criminal Procedure Code in all cases, and yet that he is shut out from one particular section of it in some cases; but I am bound to look at the intention of the Legislature in making whipping a legal punishment at all.

28. Looking to the objects of the Whipping Act, it is quite clear to me that that Act empowered Magistrates to administer the punishment of whipping to two broad and distinct classes of offenders; firstly, offenders whom it was thought necessary to punish with whipping in lieu of other punishments; and, secondly, more hardened offenders who, on conviction of certain specified offences, were thought fit subjects for whipping in addition to other punishments. But I am unable to come to the conclusion that Act VI of 1864 contemplated that whipping should be cumulative, except in the case of hardened offenders.

29. For instance, a man, not being an old offender, is arraigned, tried and convicted on three distinct thefts, it appears to me that it would be competent for a Magistrate to inflict on him two years and six months for one theft, and two years and six

months for a second, and not more than this for three or four instances of theft tried together. I do not think that it could have been the intention of the Legislature, and it certainly is nowhere so expressly provided by Act VI of 1864, that a Magistrate, having given the maximum of imprisonment for two offences of theft, could flog for a third offence; or that having given a sufficient amount of punishment for one offence, he could, in addition to imprisonment, inflict a whipping for a second.

30. I am quite clear, on the other hand, that in the case of hardened offenders contemplated by s. 4, he might give the maximum of imprisonment which he was competent to award, and might give a whipping of thirty stripes in addition, because I think that the law itself expressly provides for this. Further, I do not think that in any case, looking to the provisions of s. 10 of the Act, he could give cumulative whippings, that is to say, he could not give thirty stripes plus thirty stripes.

31. These are the conclusions at which I have arrived, after some discussion and a full consideration of this question; and it appears to me that my conclusions do not substantially differ from the practical effect of those arrived at by Phear, J., except in the instances of offenders previously convicted, and I may not take exactly the same view of every portion of the Act, or of all the nice questions which have arisen out of it.

Peacock, J.

32. There are two questions which have been submitted for our opinion: first, what is the limit of jurisdiction of a Magistrate with full powers in respect to imprisonment under s. 46 of the Criminal Procedure Code?

33. There seems to have been no difference of opinion upon this point. A Magistrate with full powers, upon convicting a prisoner at the same time of several offences, may sentence him to twice the amount of punishment which such Magistrate is, by his ordinary jurisdiction, competent to inflict, that is to say, to punishment not exceeding in the aggregate four years'' imprisonment, and fines not exceeding Rs. 2,000, the ordinary limit of his jurisdiction being two years'' imprisonment, and fine not exceeding Rs. 1,000; see s. 22, Code of Criminal Procedure.

34. I am speaking merely of the extent of the jurisdiction of the Magistrates: the punishment for any one of the offences cannot exceed that for which the offender is liable under the Penal Code, and the punishments should be awarded severally.

35. The difficulty which seems to have occurred was whether, if each of two offences were punishable with imprisonment of two years and fine, the Magistrate, if he should fine as well as imprison to the full extent of two years for each offence, could also direct by his sentence that, in default of payment of the fines, the offender should suffer additional imprisonment. I have no doubt that he may do so. I take the case of theft as an illustration. Theft, by the Penal Code, is punishable with

imprisonment of either description for a period not exceeding three years, or with fine, or with both. The ordinary jurisdiction of the Magistrate of the district is imprisonment of either description not exceeding the term of two years, or fine to the extent of Rs. 1,000, or both imprisonment and fine. Upon conviction of a prisoner of one offence of theft, the Magistrate could sentence him to two years'' imprisonment, and to pay a fine of Rs. 1,000. By the 64th section of the Penal Code, he might also direct by the sentence that, in default of the payment of the fine, the offender should suffer imprisonment for a certain terra, regulated by the 65th section, in excess of any other imprisonment to which he might have already sentenced the prisoner. By the 65th section of the Penal Code, the term for which the Court directs the offender to be imprisoned in default of payment of fine, is not to exceed one-fourth of the term of imprisonment, which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine. Thus, the Magistrate might for one offence of theft sentence a prisoner to two years'' imprisonment, and a fine of Rs. 1,000, and direct that, in default of the payment of the fine, the prisoner should be imprisoned for a term not exceeding half a year, that being one-fourth part of the imprisonment to which the Magistrate might sentence him for the offence.

36. S. 46 of the Code of Criminal Procedure directs that, "when a person shall be convicted at one time of two or more offences punishable under the same or different sections of the Indian Penal Code, it shall be lawful for the Court to sentence such person for the offences of which he shall have been convicted to the several penalties prescribed by the said Code, which such Court is competent to inflict; such penalties, when consisting of imprisonment, to commence the one after the expiration of the other. It shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which such Court is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court: Provided that in no case shall the person be sentenced to imprisonment for a longer period than fourteen years, and provided also, that, if the case be tried by a Magistrate, the punishment shall not in the aggregate exceed twice the extent of punishment which such Magistrate is, by his ordinary jurisdiction, competent to inflict."

37. If he convicts at the same time of two offences of theft, he may sentence for each offence to imprisonment for two years, and a fine of Rs. 1,000, and he may direct, with regard to the fine in each case, that, in default of payment, the offender shall suffer imprisonment for half a year, which sentences, in effect, will subject the offender to two years, and a half imprisonment in each case, unless the fines he paid. By payment of both the fines, the prisoner will be free from the imprisonment awarded in default of the non-payment of the fines.

38. The next question is--whether, if a person is convicted at the same time of two or more offences punishable under the Indian Penal Code, it is lawful for the Court, in

addition to the penalties prescribed by the Penal Code, to sentence the prisoner to whipping.

39. There is no doubt that, if the Magistrate sentences the prisoner for one only of the offences of which he is convicted, he may sentence him to whipping, if whipping is warranted by Act VI of 1864. But I am clearly of opinion that, if the Magistrate sentences the prisoner for both offences, whipping cannot form a portion of the punishment for either.

40. It is a rule of construction that penal Statutes, or Statutes which subject men to punishment, are to be construed strictly; and it appears to me that if there is in the whole Statute Book one Act more than another to which that rule ought to be applied, it is Act VI of 1864, which subjects adults to the punishment of whipping. The recital in that Act is, that "it is expedient that in certain cases offenders should be liable under the provisions of the Indian Penal Code to the punishment of whipping." S. 1 enacts that, "in addition to the punishments described in s. 53 of the Indian Penal Code, offenders are also liable to whipping under the provisions of the said Code." The word "are" cannot have been intended to mean that whipping was one of the punishments which the Indian Penal Code authorized, because it was not so; that punishment was purposely and advisedly omitted from the Code. The word is used in a future sense, and means that, after the passing of this Act, whipping shall be one of the punishments to which offenders shall be liable under the Penal Code. The Act speaks from the time it took effect. The meaning is the same as if it had said, "offenders are now by virtue of this Act liable to whipping," &c. S. 53 of the Penal Code, which is the section referred to in s. 1 of Act VI, contains merely a description of the punishments to which offenders are liable under the Code; that is to say, that the punishments therein enumerated are the several classes of punishment to which, by the various sections of the Code, offenders of different kinds are made subject. The effect of s. 1 is to add whipping as one of the several classes of punishments, and instead of there being six, as there were under the Penal Code, there are now seven classes of punishments. Death is one of the punishments, imprisonment is another, fine is another, whipping is another. But it is not because death is one of the punishments enumerated in the Penal Code, that death is a punishment provided by the Code for every offence mentioned in the Code. Such also is the case as regards whipping.

41. S. 2 of Act VI of 1864 says, that "whoever commits any of the following offences may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the Indian Penal Code." It does not say, and it could not say, that by the Penal Code he was liable to be whipped. But it might say that, by the Penal Code, as amended by this Act, he shall be liable to be whipped. Take the case of theft. S. 2 of the Act does not say that, by the Penal Code a man who commits theft is liable to be whipped, but it says that in lieu of giving him the punishment inflicted by the Penal Code, viz., three years'' imprisonment and fine, he may be

punished with whipping. Ss. 3 and 4 render offenders liable to whipping in lieu of, or in addition to, the punishments imposed by the Penal Code.

42. S. 46 of the Code of Criminal Procedure says that, "when a person shall be convicted at one time of two or more offences punishable under the same or different sections of the Indian Penal Code, it shall be lawful for the Court to sentence such person for the offence of which he shall have been convicted to the several penalties prescribed by the said Code." But it does not say that, when a prisoner shall be convicted of two or more offences, it shall be lawful for the Court to sentence such person for the offences of which he shall have been convicted to the several penalties prescribed by any subsequent Act. The punishment of whipping is not one of the offences prescribed by the Penal Code, but it is a punishment prescribed by a subsequent Act in lieu of the punishment prescribed by the Penal Code, or in addition to it, as the case may be. The proviso in s. 46 of the Code of Criminal Procedure declares that, if the case be tried by a Magistrate, the punishment shall not in the aggregate exceed twice the extent of punishment which such Magistrate by his ordinary jurisdiction is competent to inflict. The ordinary jurisdiction of a Magistrate with full powers is defined in s. 22, viz., imprisonment not exceeding two years, or fine to the extent of Rs. 1,000, or both. If whipping be awarded in lieu of, or in addition to, any of the punishments prescribed by the Penal Code, the punishments for the several offences will in the aggregate exceed the extent of punishment which a Magistrate by his ordinary jurisdiction is competent to inflict.

43. S. 22 of the Code of Criminal Procedure is not intended to describe the punishment allotted to the several offences of which a man may be guilty, but merely the ordinary jurisdiction of the Magistrate. Take theft, as an example. Theft, by the Penal Code, is punishable with three years'' imprisonment, or with fine, or with both; but the Magistrate of the district, or a Magistrate with full powers, cannot sentence the prisoner, if he convicts him of the offence of theft, to three years'' imprisonment, and fine without limit, because his jurisdiction is limited to two years'' imprisonment, and a fine of Rs. 1,000. The punishment to be awarded for the several offences is limited by the sections of the Penal Code which provide the punishment for them, I agree that, under Act VI of 1864, a sentence of whipping may be passed by an officer not inferior to a subordinate Magistrate of the first class. The extent of whipping to which a Magistrate may sentence is not limited except by s. 10 of Act VI of 1864, which limits the amount of the punishment generally. It matters not whether whipping is imposed as a punishment by a Magistrate or by a Sessions Judge: each of them, if he can pass the sentence at all, can impose it to the full extent authorized by this Act.

44. Take theft, as an example. Theft is one of the offences for which an offender may be punished with whipping in lieu of the punishment awarded by the Penal Code. The limit of the punishment is contained in s. 10 of the Act. "In no case, if the

cat-of-nine-tails be the instrument employed, shall the punishment of whipping exceed one hundred and fifty lashes; or if the rattan be employed, shall the punishment exceed thirty stripes." By the Notification as to the mode in which the punishment of whipping is to be inflicted in Bengal, it is directed that the rattan shall be the instrument used, and that the rattan shall not exceed half an inch in diameter [6]. If a man is whipped with a rattan for one offence of theft, whether under the sentence of a Sessions Judge or under the sentence of a Magistrate with full powers, he may have thirty stripes with a rattan not exceeding half an inch in diameter. If he is flogged for that offence with the cat-of-nine-tails in those parts of the country where that instrument is allowed to be used, lie may have as many as one hundred and fifty lashes. It cannot be supposed that it was ever intended that, if a man should be convicted of two offences at the same time, he should be subject to one hundred and fifty lashes with a cat-of-nine-tails for each offence, amounting to three hundred lashes altogether, or to thirty stripes with a rattan half an inch in diameter for each offence, amounting in the aggregate to sixty stripes with such an instrument. If a man is convicted of a theft today by a Magistrate of a district, he may be sentenced to thirty stripes with the rattan; if that same man commits another offence, and is convicted by the Magistrate of that second offence six months hence, he can have thirty stripes with a rattan for that second offence. The jurisdiction of the Magistrate, as regards whipping for those two offences, is limited to thirty stripes for each, or sixty stripes in the whole. If the Magistrate convicts the offender of two thefts at the same time, is he to be allowed to give twice the extent of the punishment which he could give for one of them? When the Legislature in 1861 enacted by the Code of Criminal Procedure that, if a Magistrate should convict a prisoner of two offences at the same time, he should have power to sentence the offender to the several penalties prescribed by the Penal Code for the said offences, provided that he should not sentence to any punishment exceeding in the aggregate twice the extent of punishment which such Magistrate was by his ordinary jurisdiction competent to inflict, they knew what they were about. They knew what the punishments prescribed by the Penal Code were, and they knew that a Magistrate had not, by his ordinary jurisdiction, power to inflict more than two years'' imprisonment with a fine not exceeding Rs. 1,000. They would have taken an unjustifiable leap in the dark in dealing with the subject of punishments, if they had extended the same power with respect to any new punishment which any succeeding legislative body might think it justifiable to impose.

45. S. 46 of the Code of Criminal Procedure must be construed strictly, and limited to the penalties prescribed by the Penal Code and to the ordinary jurisdiction of the Magistrate as defined by s. 22 of the Code of Criminal Procedure. The Legislature, at the time when the Code of Criminal Procedure was passed, never intended by s. 46 to legislate beyond what they could foresee, and to give powers the result of which must have been unknown to them. The Code of Criminal Procedure did not intend to allow two punishments of whipping to be inflicted at the same time for two

offences, of which an offender might be convicted at the same time. At the time when the Code of Criminal Procedure was passed, the punishment of whipping did not exist. There is nothing in the Code of Criminal Procedure, or in Act VI of 1864, from which the Legislature can be presumed to have intended that, if a man should be convicted of two thefts at the same time, he might be sentenced to stripes for the one, and to imprisonment and fine for the other. The limitation in s. 46 could not have that effect; it is limited to twice the amount of punishment prescribed by the Penal Code, which the Magistrate can inflict according to his ordinary jurisdiction. If it be held that he can punish for one offence with stripes when he punishes for both, I see no mode by which we can escape from holding that he may punish for each by whipping. He has not, as it appears to me, the power of sentencing to whipping in lieu of imprisonment for each, and I do not see how he can have the power of sentencing to it in either. I do not believe that it was intended to sanction such a cruelty as to allow a double flogging to be inflicted upon a prisoner convicted of two offences at the same time. The object of s. 2, in giving whipping in lieu of any other punishment, appears to have been to avoid the crowding of jails, and the contamination to which offenders might be subjected by being inmates of jails. But this object would be frustrated if in the case of an offender being convicted of three thefts he might have two years'' imprisonment, and a fine for one, and stripes to the extent of thirty with a rattan half an inch in diameter for each of the others of which he might be convicted. Looking to the words of the several Acts and construing them according to the ordinary rules of interpretation, I am of opinion that, if a Magistrate proceeds under s. 46 of the Code of Criminal Procedure, he must confine his sentences strictly within its provisions. If he proceeds under Act VI of 1864, in the case of a conviction for two offences at the same time, he must be guided by that Act only, and cannot sentence the offender for more than one of the offences.

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[1] See Act X of 1872, s. 314.

[2] Ss. 8, 11, and 12 of Act VI of 1864 are repealed by s. 2, Act. X of 1872. Ss. 11 and 12 being re-enacted with some modifications by ss. 312 and 313 of the latter Act.

[3] But see Manuruddin v. Gour Chandra Shamadar, 7 B.L.R., 165.

[4] See The Queen v. Udai Patuck, 4 B.L.R.A. Cr., 5, and The Queen v. Banda Ali, 6 B.L.R., App., 95.

[5] The judgment quoted was appended to a reference to the High Court by the Joint Magistrate of Mymensing in a case of The Queen v. Nahmut Ahmed, and was in the following terms:--I think there is not the least doubt that a Magistrate can sentence for offences so punishable to two years'' imprisonment and fine, or six months'' in default of payment, total two and a half years; and in case of two or more offences, up to four years and fine, and one year''s imprisonment in default, total five years.

Flogging cannot be inflicted in lieu of any part of the punishment or punishments which, can be inflicted for any one offence. When flogging is inflicted in lien of any other punishment, no other punishment can be inflicted for that offence. And when a Magistrate has punished otherwise for two offences, I think that he cannot flog for a third offence. But in cases in which flogging can he awarded in addition to other punishment, it seems to me that the Magistrate, having jurisdiction to try the case, can inflict it in addition to the full measure of his ordinary powers, e.g., to two years and six months and to stripes in addition, or to five years and stripes in addition; and the maximum number of stripes cannot be doubled.

[6] See a Notification by the Lieutenant-Governor, dated 28th March 1864, published in the Calcutta Gazette of the 30th March 1864.