

**(1868) 01 CAL CK 0007**

**Calcutta High Court**

**Case No:** None

The Queen

APPELLANT

Vs

Boodhooa

RESPONDENT

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**Date of Decision:** Jan. 14, 1868

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### **Judgement**

Hobhouse, J.

The question is, whether the Deputy Commissioner having, under the words of Act XV of 1862, only power to pass a sentence of imprisonment, was competent, under s. 59 of the Penal Code, to commute that sentence of imprisonment into one of transportation. It seems to me that he was competent. It is very true that the Deputy Commissioner, being a person who is the chief officer charged with the executive administration of the district in criminal matters, is not a person whose jurisdiction is specially provided for under s. 22 of the Code of Criminal Procedure. But Act XV of 1862, s. 3, must be taken and read as part of the Code of Criminal Procedure. Then, under the Code of Criminal Procedure and that Act read together, the Deputy Commissioner was competent to punish the offender in question under the provisions of the Penal Code. S. 59 of that Code runs in this way:-- "In every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the Court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less than seven years, and not exceeding the term for which by this Code such offender is liable to imprisonment." If, therefore, the Code of Criminal Procedure and the other Act read together do not expressly give jurisdiction to the Deputy Collector, I am still of opinion that s. 59 does, in so many words, give that jurisdiction, because it says that the Court which sentences, that is, which under any law is competent to sentence, such offender, shall be competent to award a sentence of transportation instead of a sentence of imprisonment.

2. I would, therefore, send the proceedings back to the Judicial Commissioner, with instructions that the Deputy Commissioner had power to pass the sentence.

Macpherson, J.

3. I am of the same opinion. S. 1 of Act XV of 1862 vests the officer who tried this case "with power to try all offences not punishable with death, and under the provisions of the Code of Criminal Procedure to pass sentence of imprisonment for a term not exceeding seven years." S. 59 of the Penal Code says (reads). It appears to me, reading these two sections together, that the officer who has tried this case, having power to pass a sentence of seven years, had equally power to pass a sentence of transportation for seven years. The words of s. 59 are distinct, and in my opinion say clearly that in every case in which a Court has jurisdiction to try the case and to sentence to seven years" imprisonment, the Court may, in its discretion, give seven years" transportation instead of imprisonment.

4. It is said in the order referring the case to this Bench, that "if the power is given by the words "competent to the Court which sentences such offender," then it must be given to Magistrates when sentencing offenders under ss. 451, 457, 404, 393, 380, 325, and others, which all relate to offences punishable with seven years" imprisonment, and over which the Magistrates have concurrent jurisdiction with the Courts of Session; for there are no words in s. 59 which limit the power to Courts which are competent to pass sentence of seven year"s imprisonment or more.

5. But it appears to me that there is no substantial foundation for this argument, if the natural and reasonable interpretation is put upon the words of s. 59. Magistrates trying offences under the powers given to them by the Code of Criminal Procedure (apart from the special provisions of Act XV of 1862) have undoubtedly jurisdiction to sentence offenders to imprisonment for no longer period than two years. In the case of a Magistrate exercising only such powers, there is nothing in s. 59 which would warrant an offender being sentenced to transportation. S. 59 applies exclusively to cases in which the offender may legally be sentenced by the Court trying him to imprisonment for seven years; therefore, a Magistrate, who can imprison for only two years, has certainly no power to transport at all.

6. A further argument in favor of the contention that a sentence of transportation cannot be given in this case, has been drawn from the fact that, in s. 22 of the Criminal Procedure Code, a distinction is made between the powers of "the Court of Session" and of the "Assistant Sessions Judges" in Bombay,--the Court of Session being declared competent to pass sentence of "death, transportation, imprisonment of either description for a period not exceeding fourteen years," &c., while the Assistant Sessions Judges in Bombay are limited in their powers to "imprisonment of either description for a term not exceeding seven years," &c. It is argued that, because in the case of a Court of Session, the word "transportation" heads the list of punishments which may be inflicted by the Court, and as the word "transportation" is omitted in the case of Assistant Sessions Judges, therefore sentences of transportation cannot be substituted by the latter class of Judges for sentences of imprisonment. But in my opinion, the deduction thus made from the omission, in

the second instance, of the word "transportation," is not correct: for, a very sufficient reason for its omission is to be found in the fact, that there are certain offences under the Penal Code for which transportation is either the only punishment which can be inflicted short of death, or for which transportation is a substantive punishment in itself, and not merely one convertible with, or to be awarded in lieu of, imprisonment. When the offence committed is murder, for instance, the sentence must be either death or transportation for life. There are many sections of the Penal Code in which transportation for life is mentioned, either as the only punishment, or as one of the punishments which may be awarded. Ss. 450, 459, and 468 are instances of sections which give the power of imprisoning only for ten years, but at the same time authorize a substantive sentence of transportation for life. Therefore, it seems to me, that there is a very Sufficient reason (quite independently of any intention to prevent the Assistant Sessions Judges from sentencing to transportation in lieu of imprisonment) why s. 22 of the Code of Criminal Procedure should specifically name transportation as one of the sentences which Courts of Session are competent to pass. I see no reason to suppose it was intended that the power of sentencing to transportation in lieu of imprisonment for a term not exceeding seven years should not, under the provisions of s. 59 of the Penal Code, be exercised by Assistant Judges in Bombay.

7. In my opinion, in every case in which the Court passing sentence has jurisdiction to sentence to imprisonment for seven years, the Court has also jurisdiction under s. 59, in its discretion, to pass a sentence of transportation for seven years.

Jackson, J.

8. I am still of the opinion that I expressed in referring this case for the consideration of a Full Bench, and in which my learned colleague Mitter, J., agreed.

9. My opinion is based chiefly upon the position that the Indian Penal Code is one that deals with the awards of punishment and the liability of the offenders to such punishment, while the Criminal Procedure Code is the one which indicates the Courts which are to apply these provisions and so award the several degrees of punishment. I am not aware that any section of the Indian Penal Code expressly defines, or in any way declares what the powers of any particular Court shall be, S. 53 details the several punishments to which offenders are liable under the provisions of the Code, and they are specified; (1) as death; (2) transportation; (3) penal servitude; (4) imprisonment, which is of two descriptions, rigorous and simple; (5 and 6), forfeiture and fine. S. 59 declares that "in every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the Court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less than seven years," that is, to transportation for not less than seven years, "and not exceeding the term which by this Code such offender is liable to imprisonment." I do not understand by that section that the transportation to be awarded in lieu of

imprisonment was to be given precisely year for year, but there were certain limits fixed, namely, that transportation was to be for a term not less than seven years, and not exceeding the term for which the offender could be imprisoned. It is useful in considering the effect of this section, perhaps to refer to the sections of the original Penal Code prepared by the Indian Law Commissioners. By s. 43 of that Code, the Court had not the power to commute or to pass sentence of transportation in lieu of imprisonment, but the power was given to the Government of the Presidency. The words are, "in every case in which sentence of imprisonment for a term of seven years or upwards has been passed on any offender who is not both of Asiatic birth and of Asiatic blood, it shall be lawful for the Government of the Presidency within which the offender has been sentenced, at any time within two years after the passing of such sentence, to commute the remaining imprisonment, without the consent of the offender, for transportation for a term not exceeding the unexpired term of imprisonment, to which may be added banishment for life, or for any term, from the territories of the East India Company." Apparently, in the long consideration which the Indian Penal Code underwent before it passed into law, it was considered that it would be more convenient to vest the power of passing sentence of transportation in the Court which tried the prisoner, instead of in the local Government: still I do not understand that change in the provision of the law, as in any respect importing any power as granted to the several Courts, or to any of the Courts, which they did not possess under the law which expressly regulated those powers. I am willing to construe s. 59, either strictly according to its words, or by what appears to me to be a reasonable construction. It seems to me that if that section is to be construed strictly by its own words, as I have stated in my minute referring this case to the Full Bench, there is nothing whatever to prevent a Magistrate in those cases where he has concurrent jurisdiction over an offence with the Court of Session, and where an offender might be punished with imprisonment to the extent of seven years, from passing, under this section, a sentence of transportation. Nor, of course, is there anything to prevent an Assistant Sessions Judge in Bombay from passing a like sentence. This consequence is avoided in the opinion of my learned colleagues by stating that the Magistrate has no authority to pass sentence of imprisonment to the extent of seven years, but then, as I have already stated, it appears to me that transportation is not to be given in lieu of imprisonment year for year, but the law distinctly says that, whenever an offender is punished with imprisonment of seven years or upwards, it shall be competent to the Court which sentences such offender, whether that be a Court capable of awarding seven years" imprisonment or not, to sentence that offender to transportation for a term of not less than seven years.

10. S. 59 is a portion of the Indian Penal Code which is otherwise called Act XLV of 1860. The Criminal Procedure Code was passed in the year 1861: it may therefore be looked upon as an expression of the later opinion of the Legislature, and, if the provisions of these two laws in any respect conflict, I presume that the provisions of

the later law must prevail. Now Act XV of 1862, by s. 3, is to be taken and read as part of the Code of Criminal Procedure. I understand the meaning of that to be that the several parts of the Act XV of 1862 are to be taken and inserted in their appropriate place in the Code of Criminal Procedure, that is to say, that the definition of the status and powers of the officer described in s. 1 of that Act is to be put in its appropriate place in the 22nd section of the Procedure Code. He would then probably take place after the Court of Assistant Sessions Judge in Bombay. Reading, then, the Courts referred to in that section in the order in which they come, we find first the Court of Session, next the Assistant Sessions Judges of the Presidency of Bombay; thirdly, the Chief Officer charged with executive administration of a district in criminal matters in what may be called extra-Regulation provinces. S. 22 says, "the offences mentioned in the Schedule annexed to this Act shall, subject to the provision contained in the third explanatory note prefixed to the said Schedule, be triable by the Courts specified in column 7 of the said Schedule, and such Courts shall be competent to pass sentence in respect of such offences within the following limits;" that I understand to be a declaration of the powers of the several Courts, implying that the Courts specified in that section are to be restricted within the limits therein prescribed.

11. A difficulty arises in respect of certain cases, which are not offences under the Indian Penal Code, but which are constituted and rendered punishable by later Acts, or by special or local laws. That difficulty does not occur in the present instance, as we are dealing with a case which is comprised in the Schedule annexed to the Code of Criminal Procedure, and is therefore governed by that section. And then I understand that in column 7 of the said Schedule, the Court of the officer described in Act XV is to be inserted in every place where a Court of Session is now to be found, except in cases where the offence is punishable with death. The effect of that would be, I think, that in all cases the particular offences would be punishable by that Court, and that the limits of the powers of that Court to pass sentence would be imprisonment of either description for a term not exceeding seven years, including such solitary confinement as is authorized by law, or fine, or both. I find myself unable to understand the argument which proposes to do away with the effect of the word "transportation" as used in the 22nd section in speaking of the powers of the Court of Session. Transportation, it appears to me it cannot be too often stated, is a separate description of punishment within the competency of one Court, and one Court alone, to award, namely, the Court of Session, and that Court is, it seems to me, alone authorized by law to award that particular punishment; and, therefore, although, under s. 59 of the Indian Penal Code, particular offenders are made liable to transportation, that must be governed by the section of the Criminal Procedure Code which limits the power of the Courts. It appears to me, then, that taking the Penal Code together with the Code of Criminal Procedure, it must be pre-supposed that the Court which sentences is one which is by law enabled to pass the sentence of transportation.

12. I therefore think the Court of the Deputy Commissioner was not competent to sentence the prisoner to transportation, and that the sentence is not legal.

Seton-Karr, J.

13. I concur with my colleagues Hobhouse and Macpherson, JJ.

14. The position and duties of officers in Non-Regulation Provinces, vested with powers under Act XV of 1862, may, no doubt, occasionally appear somewhat anomalous, and it may be necessary to look closely, as in this instance, into the extent of the powers with which they are vested by law. But when I see that by Act XV of 1862 the Deputy Commissioner is empowered to pass a sentence of imprisonment for a term not exceeding seven years, and when I consider that the punishments which he must award must be substantially the punishments of the Penal Code which he administers, I can come to no other conclusion than that, under s. 59 of that same Penal Code, he is empowered to pass sentences of transportation where he is empowered, as he undoubtedly is, to pass a sentence of imprisonment.

15. In this view I have only to say that I think the sentence of transportation passed by the Deputy Commissioner of Lohardugga is legal.

Peacock, J.

16. I concur with the majority of my colleagues in thinking that the Deputy Commissioner in this case had power to pass sentence of seven years' transportation. His powers were derived, not under the provisions of s. 22 of the Code of Criminal Procedure, but under s. 1 of Act XV of 1862. The substance of that section is, that, whenever under the provisions of s. 445 of the Code of Criminal Procedure the Code has been, or shall be, extended to any part of the territories not subject to the general Regulations, it shall be lawful for the Governor-General in Council, or for the Local Government of such territory, to vest the Chief Officer charged with the executive administration of a district in criminal matters, by whatever designation such officer is called, with power to try all offences not punishable with death, and under the provisions of the said Code to pass sentence of imprisonment of either description for a term not exceeding seven years, including such solitary confinement as is authorized by law, or fine, or both; and by s. 3, "this Act shall be taken and read as part of the Code of Criminal Procedure." I assume that, under the provisions of this Act, the Deputy Commissioner of Lohardugga was vested with the power to pass sentence of imprisonment of either description for a term not exceeding seven years. Having that power, it appears to me that s. 59 of the Penal Code gave him the power instead of passing sentence of imprisonment for seven years to pass sentence of transportation for a term not less than seven years, and not exceeding the term for which the prisoner was liable to imprisonment. The Penal Code in that section, not only enacted what was the amount of punishment for particular offences, but it vested the Court which should

sentence the offender with power to award transportation of not less than seven years, instead of awarding sentence of imprisonment. It went out of the ordinary course adopted in other parts of the Code, and, instead of merely defining the punishment, gave a certain power to the Court which should pass the sentence to award a different kind of punishment from that specified in the Code. My colleague, Louis Jackson, J., has referred to the Penal Code as it was originally prepared by the Law Commissioners for the purpose of showing that, under that Code as it was prepared, the Court had not the power to commute or to pass sentence of transportation in lieu of imprisonment, but that the power was given only to the Government of the Presidency. He points that out to show that, under the Penal Code as originally prepared, the power of passing sentence of transportation instead of imprisonment was vested in the Government, and not in the Courts. There was a very good reason for that, and for the alteration which took place in the Penal Code when it was finally settled. At the time when the Penal Code was prepared by the Indian Law Commissioners, it was a rule of the Court of Directors of the East India Company that no native should be sentenced to transportation for a period less than for life; it being the opinion of that time that a native of India, if once transported, should never be allowed to return to this country. The Indian Penal Code, as prepared by the Law Commissioners, did not provide transportation as punishment for any period short of life, and it did not give power to the Government to commute a sentence of imprisonment for seven years for transportation, except in cases where the prisoner was not of Asiatic blood and of Asiatic birth. But when the Penal Code came to be altered, a different rule was thought necessary. It was thought reasonable that natives of India, as well as Europeans and others, should be sentenced to transportation for periods less than for life, and that the reason for not allowing a native who had once been transported to return to India no longer held good; and, therefore, as the Penal Code, as prepared by the Indian Law Commissioners, did not provide transportation as a punishment for any less period than for life, it was thought advisable, when the Code was altered, to enact by a general clause that, in all cases in which an offender should be punishable with imprisonment for seven years or upwards, the Court should have power to sentence him to transportation instead of imprisonment, provided the term should not be less than seven years, and should not exceed the term for which the offender should be liable to imprisonment. That is the reason why s. 59 was introduced. It necessarily gave power to a Court which could sentence a prisoner to seven years' imprisonment to sentence him to seven years' transportation in lieu of it; but it never intended to give power to a Court which could not sentence to imprisonment for more than two years to transport for seven. It appears to me to follow that, as the Deputy Commissioner is a Court which has the power of sentencing to imprisonment for seven years, he has power to sentence to transportation for a period not less than seven years.

17. It is said that if this construction be put upon s. 59, then in every case in which a Magistrate tries an offence punishable with seven years' imprisonment, although that Magistrate could not sentence to the full extent of imprisonment, he would have the power instead of sentencing him to two years' imprisonment to sentence him to transportation for not less than seven years. It appears to me that that would be a most unreasonable and forced construction of s. 59, and that such a construction ought not to be put upon it. If a man is convicted before a Magistrate of an offence which is made punishable by the Penal Code with seven years' imprisonment, the offender is not punishable with imprisonment for seven years; because, upon that conviction, there is no one competent to punish him with seven years' imprisonment, a Magistrate not having power to imprison for more than two years. The words of s. 59 are "every case in which an offender is punishable," &c., not every person convicted of an offence which by this Code is punishable, &c. The meaning of the section clearly is that where the prisoner is punishable with an imprisonment for a term of seven years, it shall be competent to the Court, which has power to sentence him to that punishment, to sentence him to transportation instead of imprisonment. In this view of the case, a Magistrate would not have power to transport. It never could have been intended to give power to a Court which has not power to sentence to imprisonment for more than two years to transport for seven years. It would not lie within either the words or the spirit of the section. Under these circumstances, it appears to me that the Deputy Commissioner had the power to pass sentence of transportation for seven years; that the Judicial Commissioner came to a right conclusion in telling him that he had that power; and that he was right in passing that sentence. Consequently the sentence must be affirmed.

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<sup>1</sup>Act XV of 1862 was repealed by Act VIII of 1869, which in turn has been repealed by Act X of 1872. See now s. 36 of the latter Act.