FULL BENCH (CRIMINAL).

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Leach, and Mr. Justice Dunkley.

KING-EMPEROR *v.* ISMAIL.*

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Aug. 17.

Young offender—Sentence of detention in Training School not one of imprisonment—Borstal institution not a jail—Order of detention for one offence and sentence of whipping for another offence at same trial—Sentence of whipping where to be carried out—Superintendent of school not a jail officer—Prison and jail—Period of detention—Inquiry as to age—Court's duty to guide school authorities—Prevention of Crime (Young Offenders) Act (Burma Act III of 1930), ss. 24, 25, 30—Criminal Procedure Code (Act V of 1898), ss. 390, 391.

Where a youthful offender is sentenced to detention in a training school he is not sentenced to imprisonment, and a Borstal institution is not a jail. So where such an offender, for one offence, is ordered to be detained in a training school and, for another offence tried at the same trial, is sentenced to whipping, the magistrate must act under the provisions of s. 390 of the Criminal Procedure Code, and either order the whipping to be inflicted in his own presence, or direct that it shall be inflicted at some convenient jail in the presence of the officer in charge of the jail. The superintendent of the school is not an officer in charge of a jail and cannot carry out the sentence of whipping.

The question whether a Borstal institution is a prison discussed but not decided.

In ordering detention in a senior training school the magistrate must specify the period for which the offender shall be detained. The period is required by law to be not less than two years, but on the other hand the offender can only be detained up to his 19th birthday. Therefore it is the duty of the magistrate to inquire into and fix the age of the offender, and his order should be accompanied by a reference to the date upon which the 19th birthday occurs for the correct guidance of the school authorities.

King-Emperor v. *Nga Bala*, I.L.R. 14 Ran. 327—*followed.*

Tun Byu (Officiating Government Advocate) for the Crown. The two questions that fall for determination are whether the sentences are legal, and secondly where the sentence of whipping is to be carried out.

There is no doubt that the sentences are legal and just. *Nga Ohn Shwe* v. *King-Emperor* (1).

* Criminal Revision No. 467A of 1936 from the order of the 5th Additional (Special Power) Magistrate of Moulmein in Cr. Regular Trial No. 19 of 1936.

(1) I.L.R. 12 Ran. 344.

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But the magistrate should have directed the accused to be detained in a Borstal school for a period of three years, as he found the accused to be between the ages of 15 and 16. The period of detention must not extend beyond the age of 18. *King-Emperor* v. *Nga Bala* (1).

It is clear that detention in a Borstal school is not meant to be by way of punishment. *See* s. 53 of the Indian Penal Code. A Borstal institution is not a prison. Halbury, Vol. 23, p. 235; s. 4 (2) of the Prevention of Crime Act, Chitty's Statutes, Vol. 3, p. 398. The Reformatory Schools Act, 1897, which was passed subsequent to the Prisons Act of 1894, made it clear by classifying a youthful offender as a person different from an ordinary prisoner.

[Goodman Roberts C.J. referred to ss. 14, 28 and 34 of the Reformatory Schools Act. A reformatory school is normally not a prison.]

The rules made under the Prevention of Crime (Young Offenders) Act proceed on the assumption that a Borstal school is not a prison, and therefore provide expressly for what may be called "Borstal offences" putting them in the same category as prison offences.

The superintendent of a Borstal school is not "a superintendent of jail" and he has therefore no power to carry out the sentence of whipping. But the magistrate has ample powers under ss. 390 and 391 of the Criminal Procedure Code to direct how the sentence is to be carried out. See *The King* v. *Lydford* (2).

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(1) I.L.R. 14 Ran. 327. (2) (1914) 2 K.B. 378.

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GOODMAN ROBERTS, C.J.—This case arises out of the conviction of one Nga Pyu, a youth of between 15 and 16 years, who was convicted on two charges, one of causing grievous hurt, for which offence he was ordered to be detained at the Senior Training School at Thayetmyo for four years, and secondly, of causing simple hurt, for which he was ordered to receive 15 lashes by way of school discipline. There is no question but that his conviction was right, but two questions arise for us to determine, first, whether the sentences were legal, and, secondly, where the whipping should be carried out.

First of all by sections 24 and 25 of the Prevention of Crime (Young Offenders) Act, 1930, it is specifically enacted that detention in a training school may be awarded to all persons between the ages of 16 and 19 years, and by section 24 (*b*) the order shall specify the period for which a person shall be detained in the school provided that the period shall be such as the Court deems proper for his training, being not less than two years and not extending beyond the age of 18 in the case of a person sent to a senior school. When we enquire the length of time for which a person can be sent to a training school and the meaning of the words "not extending beyond the age of 18," we follow the decision of my learned brother Dunkley in *King-Emperor* v. *Nga Bala* (1), where he points out that the expression "beyond the age of 18" must mean and include the period up to the 19th birthday of the person concerned. The duty of the Magistrate in such a case is to fix the age of the accused person as nearly as he can from the evidence, and here he was satisfied that the accused

(1) (1936) I.L.R. 14 Ran. 327.

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person was between the age of 15 and 16 years. Adopting the guidance laid down for him in the Burma Courts Manual he should then, and the Court now does, fix the 15th birthday of this youth as being January 1st, 1936, and that being so he is liable to be detained up to the 31st December 1939, that is up to the date of his 19th birthday, and the proper order for the Court to pass in the circumstances was that he be detained in a senior training school until his 19th birthday, and the order should be accompanied by a reference to the date upon which the 19th birthday occurs in order that the school authorities may with certitude carry out the duties entrusted to them.

Passing on to the second part of the question, namely, where the sentence of whipping should be carried out, we have been in some little difficulty by reason of the different phraseology adopted in the various statutes. It is, however, clear that persons sentenced to detention in Borstal Institutions are not sentenced to imprisonment and that a Borstal Institution is not a jail. The question of whether it is a prison is not quite so easy to determine. By section 3 of the Prisons Act, 1894, "prison" means any jail *or place used permanently or temporarily under the general or special orders of a Local Government for the detention of prisoners.* Speaking for myself, the matter becomes clearer when we consider that under section 4 of the Reformatory Schools Act, which was passed later, boys who have been convicted of any offence punishable with transportation or imprisonment are denominated youthful offenders, and throughout the Act there is a reference to them as such. In all the statutes relating to Borstal Institutions and senior and junior training schools those places seem to be referred to as institutions and

schools respectively, and the persons confined in them designated either as inmates or by some other name which seems to differentiate them designedly from prisoners. It is, in my opinion, by no means loose speech when a judge or magistrate constantly tells a youthful offender that he is not going to send him to prison but will order him to be detained in a Borstal Institution. The object of a Borstal Institution is that it shall be apart altogether from prison influences and shall have a reformative and not primarily a penal effect. In the Prisons Act of 1900 it is specifically enacted by sections 14, 28 and 34 that in Parts IV, VI and IX of the Act all references to prisons or to imprisonment or confinement shall be construed as referring also to Reformatory Schools or to detention therein, and I should have thought that this means that in the absence of such specific enactment references in a statute to prisons or to imprisonment should not ordinarily be construed as referring to Reformatory Schools unless some special provision were made in that behalf. However, it is fortunately not necessary finally to decide the question whether a Borstal Institution is a prison. The difficulty may arise in this way, that if a Borstal Institution not being a jail is also not a prison, it may be there are inadequate provisions for the regulation of matters within the institution which are dealt with in the case of prisons by the Prisons Act. If that be so, in my humble opinion it is a matter for the Legislature and not for us, but we are content in this case to say that a Borstal institution being clearly not a jail under section 391 of the Criminal Procedure Code the Superintendent of the Senior Training School at Thayetmyo is not an officer in charge of a jail and cannot, in his position as Superintendent

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of the Training School, carry out the sentence of whipping which was ordered by the Magistrate.

The Magistrate's duty in this matter lies under section 390. He has passed a sentence of whipping to which no sentence of imprisonment has been added in addition, and that sentence may be executed at such place and time as the Court may direct. In some cases it may be desirable for a Magistrate to see that the whipping is inflicted in his presence: in other cases it may be desirable for him to direct that it shall be inflicted in a jail. I think that in this particular instance the proper order should be that the accused should be taken to the Thayetmyo Jail and should there receive the sentence of 15 lashes which has been passed upon him, and should then be taken back to serve the remainder of his sentence in the Senior Training School which will expire on December 31st, 1939.

LEACH, J.—I am in agreement with the views of the learned Chief Justice on the questions involved in this reference.

With regard to the question whether a Borstal Institution is a prison I would refer to section 30 of the Prevention of Crime (Young Offenders) Act, 1930, as amended by the Prevention of Crime (Young Offenders) (Amendment) Act, 1934. Section 30, subsection (*d*), states that the Local Government may order that any person detained in a training school shall be transferred to a prison. There is here a clear distinction between a training school and a prison. It would, to my mind, be contrary to the whole intention of the Act to classify a Borstal Institution as a prison.

I agree in this case that the whipping should be carried out at the Thayetmyo Jail.

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DUNKLEY, J.—The Legislature has not seen fit, so far as I am aware, in any enactment to define the word "Jail," and therefore this word must be construed in accordance with its ordinary meaning, which is a place the primary purpose of which is the confinement of persons undergoing a sentence of imprisonment passed by a criminal Court. It is clear from the provisions of sections 24 and 25 of the Prevention of Crime (Young Offenders) Act that a person ordered to be detained either in a training school or in a Borstal institution is not sentenced to imprisonment, and I have so held in the case of *Nga Tha E and another* v. *King-Emperor* (1). Consequently, I am quite clear that the Borstal Institution and Senior Training School at Thayetmyo is not a jail. It is fortunately not necessary for us to decide the question whether that institution is a prison or not. According to common usage, there is no real difference between a jail and a prison, but the latter word has been defined in section 3 of the Prisons Act of 1894, and that definition gives to the word "prison" a wider meaning than "jail." Were we obliged to construe the meaning of the word "prison," we should have to construe it strictly with reference to that definition, and, as at present advised, my own opinion is that the Borstal Institution and Training School at Thayetmyo is a prison, within the meaning of the definition in section 3 of the Prisons Act of 1894. However that may be, the point really does not affect he question before us, which is whether a youthful offender, who has been sentenced to whipping, can be whipped by the Superintendent of the Borstal Institution.

Under the provisions of section 391, sub-section (*2*), of the Code of Criminal Procedure, whipping must be inflicted in the presence of an officer in charge of a jail

(1) (1936) I.L.R. 14 Ran. 143.

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unless the Judge or Magistrate orders it to be inflicted in his own presence. As we have held that the Borstal Institution at Thayetmyo is not a jail, the Superintendent thereof is not an officer in charge of a jail, and, therefore, a sentence of whipping cannot be carried out in his presence. I agree that in cases of this kind, where a youthful offender, for one offence, is ordered to be detained in a Training School or a Borstal Institution, and, for another offence tried at the same trial, is sentenced to whipping, the Magistrate must act under the provisions of section 390 of the Code of Criminal Procedure, and either order the whipping to be inflicted in his own presence, or direct that it shall be inflicted at some convenient jail in the presence of the Officer in charge of the jail. In the present case, where the Magistrate has not had the whipping inflicted in his own presence, the only order that we can make is to direct that the whipping shall be inflicted at the Thayetmyo Jail in the presence of the Officer in charge of that Jail.