[FULL BENCH.]

Before Mr. Justice Norman, Officiating Chief Justice, Mr. Justice Loch, Mr. Justice Bayley, Mr. Justice Kemp, Mr. Justice Phear, Mr. Justice Macpherson, and Mr. Justice Mitter.

MANIRUDDIN AND ANOTHER *v.* GAUR CHANDRA SHAMADAR.* 1871 *May* 30.

Whipping—Indian Penal Code (Act XLV of 1860)—Criminal Procedure Code (Act XXV of 1861) s. 46—Act VI of 1864.

Where the prisoner was convicted by the Magistrate of three distinct and separate offences, and was sentenced to a month's imprisonment for the offence of wrongful confinement under section 342, six month's imprisonment for the offence of voluntarily causing grievous hurt under section 325, and to whipping with 20 stripes for the offence of theft, under section 378, of the Indian Penal Code, it was *held* (Kemp and Phear, JJ., *dissenting*) that the sentence was legal.

Where a person is convicted at the same time of two or more offences punishable under the Indian Penal Code, *held* (Kemp and Phear, JJ., *dissenting*) that it is lawful for the Court, in addition to the penalties prescribed by the Penal Code, to sentence the prisoner to whipping.

Nassir v. *Chunder* (1) not followed.

ON the morning of the 9th Chaitra (22nd March), Gaur Chandra Shamadar carried off a cow belonging to Maniruddin, under circumstances which, in the opinion of the Magistrate, constituted the offence of theft. On the evening of the same day, Maniruddin went to complain to the talookdar whose ryot he was.

Gaur Chandra, who lived near the talookdar, on seeing Maniruddin, seized him, carried him inside the veranda of his house, and beat him.

Gopal Shamadar, hearing the outcries of Maniruddin, remonstrated with Gaur Chandra, upon which Gaur Chandra attacked Gopal, and struck him with a *lathi*, breaking his arm.

The Magistrate convicted Gaur Chandra on three charges:—

* Reference, under section 434 of the Code of the Criminal Procedure by the Sessions Judge of Backergunge.

(1) Reference by the Sessions Judge of Mymensing under Circular Order (No 17, dated 17th June 1863), March 12th, 1868.

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1st, of theft, under section 178; 2nd, of illegal confinement of Maniruddin, under section 342; and, 3rd, of causing grievous hurt to Gopal Shamadar, under section 325.

For the first offence Gaur Chandra was sentenced to and received 20 stripes; for the second to one months rigorous imprisonment; and for the third to six months' rigorous imprisonment.

The prisoner appealed to the Sessions Judge, on the ground that the Magistrate's sentences of imprisonment, in addition to whipping, were illegal and cited *Nassir* v. *Chunder* (1), and referred to Act VI of 1864, section 9.

The Judge considered that the charges against the prisoner were well proved; but the prisoner was wrong in referring to Act VI of 1864, section 9, as the sentence under section 379 was whipping, and not "whipping *plus* imprisonment," and the next sentence was to commence after the whipping.

With reference to the case cited, he considered that the sentence of imprisonment could not stand; and as the sentence for one month under section 342 was not within his cognizance as an Appellate Court, he requested the opinion and order of the High Court with reference to the sentences.

On the 13th May 1871, the case was referred to a Full Bench by Norman and Loch, JJ., who thought that the rule laid down in *Nassir* v. *Chunder* (1) repuired further consideration.

The following judgments were delivered:—

NORMAN, J.—Gaur Chandra Shamadar was tried by the Magistrate of Backergunge, and convicted at the same time of three totally distinct and separate offences. He was sentenced to a month's imprisonment for the offence of wrongful confinement under section 342; six months' imprisonment for the offence of voluntarily causing grievous hurt under section 325; and to whipping with 20 stripes for the offence of theft, as defined in section 378 of the Penal Code.

Each of these sentences taken by itself is a legal punishment for the offence in respect of which it was pronounced. As

(1) Referance by the Sessions Judge of Mymensing under Circular Order (No. 17, dated 17th June 1863), March 12th, 1868.

regards the sentence of whipping, the 2nd section of Act VI of 1864 enacts that "whoever commits any of the following offences," of which theft is one, "may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the Indian Penal Code." The punishment of whipping was therefore legally substituted for the punishment to which Gaur Chandra would have been liable for the offence of theft.

If the trial for each offence had taken place separately, there would have been no possible doubt of the legality of the three separate sentences.

Let us now see on what principle it can be said that if, instead of trying the charges separately, a Criminal Court of competent jurisdiction tries the prisoner on the three charges at the same time, it is incompetent to pronounce that the accused shall suffer for each offence the penalty prescribed by the law. I leave aside for the moment the question of the jurisdiction of the Magistrate, to which I propose to come hereafter. Sir Barnes Peacock says:—"The 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." I confess I do not understand why not if the sentence for each offence is itself legal. The 1st section of Act VI of 1864 enacts that, "in addition to the punishments prescribed in section 53 of the Indian Penal Code, offenders are also liable to whipping under the provisions of that Code." Sir Barnes Peacock refers to section 46 of the Code of Criminal Procedure. He says:—"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 for which he shall have been con-"victed to the several penalties prescribed by any subsequent "Act." He assumes, Mr. Justice Phear states more directly, that "a Magistrate" (or Criminal Court, for the same argument must apply to all Criminal Courts) "cannot pass simultaneously "several sentences which shall take effect in succession to one "another. That provision is given solely by the Code of

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"Criminal Procedure." Again, he says:—"I think a Magistrate "has no power to inflict a succession of punishments, except "under the provisions of section 46 of the Code of Criminal "Procedure." Now, by section 22, a Magistrate is declared competent to pass sentence, in respect of the offences triable by him within the limit of "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." Suppose section 46 had never been enacted, and a Magistrate, having convicted a prisoner of theft and violent assault on the police attempting to arrest him, had sentenced him to six months imprisonment for each offence, the second sentence to take effect at the expiration of the first. What objection would there be to the sentence? The amount of punishment would be within the limit which the Magistrate was competent to inflict, and in each case a sentence of imprisonment for six months would be legal. It is not easy to understand why the prisoner should not suffer the full penalty of the offences committed by him.

If the sentence would be illegal, it must be because there is some rule of law which prevents a judicial officer from passing a sentence of imprisonment to take effect in future after the expiration of an existing sentence, or sentence for another offence pronounced at the same time.

The question was raised upon a writ of error argued in the House of Lords in the year 1769, in the case of *John Wilkes* v. *The King* (1), where the House of Lords, affirming the judgment of the Court of King's Bench, in accordance with the unanimous opinion of the Judges, held that a sentence of imprisonment against a defendant to commence from and after the determination of an imprisonment to which he was before sentenced for another offence was good in law. See also 1 Chitty's Criminal Law, 718.

In my opinion it is clear that section 46 of the Code of Criminal Procedure (which is analogous to the English enact-

(1) 4 Brown's Par. Cas., 367; S. C., 4 Burrows' Rep., 2577.

ment, 7 & 8 Geo. IV, c. 26, s. 10, and to the 23rd section of 9 Geo. IV, c. 74, rendered applicable to offences under the Penal Code triable on the original side of the High Court by Act XVIII of 1862) was not necessary in order to create, but was passed in order to regulate and extend the power of Courts in passing such sentences.

Sir Barnes Peacock thinks that section 46 must be construed strictly, and treats it as not applying to penalties imposed by any subsequent Act. I confess I do not understand that view of the case. It seems to me that section 46 is part of a general Code of Criminal Procedure applicable not only to offences created by the Penal Code, but presumably to all offences created by subsequent legislation; and that if section 46 does not apply to offences or penalties created after the passing of the Code of Criminal Procedure, the same argument must apply to any other portion of that Code. From the date of the passing of Act VI of 1864, whipping is made one of the penalties which by the Indian Penal Code are prescribed for the punishment of offenders. I think that the Indian Penal Code and the Code of Criminal Procedure must be read as if the Whipping Act formed a part of the Penal Code from the date of its enactment. In passing a sentence of whipping, a Magistrate is not exercising any extraordinary jurisdiction. It is a sentence which, since the passing of Act VI of 1864, he is competent to inflict in the exercise of his ordinary jurisdiction. I think it plain that we must read section 46 as applying to all offences and punishments as prescribed by the Indian Penal Code in its present and amended form.

The 46th section consists of two parts or clauses; the first part an empowering or enabling clause, the power being limited by the second part or proviso. The first clause is as follows:—

"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

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"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." Under the first clause, reading it according to its ordinary grammatical construction, when a prisoner has been convicted of several offences, a Criminal Court, competent to inflict the penalty of whipping, is competent to punish one of such offences with whipping, that being one of "the several penalties prescribed by the Code;" and other offences with other of "the several penalties prescribed by the Code," such as imprisonment or the like. Then come the qualifications or provisoes, the second of which we have to deal with:—"Provided that, if the case be tried "by a Magistrate, the punishment shall not in the aggregate "exceed twice the amount of punishment which such Magis-"trate is by his ordinary jurisdiction competent to inflict." The limit of the power of imprisonment possessed by the Magistrate of the district is two years, and fine to the extent of Rs. 1,000. A Magistrate before the passing of the Whipping Act, under section 46, could have sentenced an offender, convicted at the same time of several offences, to an aggregate of punishment amounting to four years' imprisonment, and fines amounting to Rs. 2,000. Since the passing of the Whipping Act, the Magistrate has the power to inflict whipping in lieu of imprisoument for certain offences. If section 46 does not apply to punishment under the Whipping Act, the only question as to such sentence would be whether it is a legal punishment for the offence for which it is to be inflicted. The imitation, under section 46, of the Magistrate's power would not apply to a sentence of whipping. But if section 46 does apply, as I think it does, the punishment in the present case is clearly warranted by it. The Magistrate of a district has power to inflict two years' imprisonment, with whipping in certain cases, or whipping in lieu of imprisonment in others. Twice that would be four years' imprisonment, with (or in lieu thereof) two whippings. One whipping and seven months' imprisonment is clearly within the limit of twice the amount

of imprisonment which the Magistrate was competent to inflict.

I am therefore of opinion that the sentences upon the prisoner Gaur Chandra are not illegal. I do not discuss the question whether a Magistrate has power to inflict two whippings. That depends entirely on the construction of the Whipping Act. I confess I do not think it presents much difficulty.

LOCH, J.—I concur in the view taken by the Chief Justice that Act VI of 1864 should be read as part of the Penal Code, though there be no express words to that effect in the Act. It appears however to me from the preamble to the Act, as well as from the wording of sections 1, 2, 3, and 4, that this view is correct. Whipping was a punishment excluded from the list of punishments prescribed by the Penal Code. It has been added to that list by Act VI of 1864. And this punishment is to be inflicted as shown by sections 2 and 3 of the Act in lieu of, or in addition to, any punishment prescribed by the Penal Code. I would therefore read the Code as Mr. Justice Jackson did on a former occasion when this question was before the Court, *e. g.*, I would read the punishment prescribed for theft as follows :—"Whoever commits theft, shall be punished with imprisonment of either description for a term which may extend to three years, or to fine, or both," or with whipping in lieu of, or in addition to, other punishment as the case may be, and so on in other cases where the offence is made punishable with whipping under Act VI of 1864. A party convicted of theft for the first time would be liable to be whipped in lieu of other punishment. If convicted of theft a second time, he would be liable to whipping, in addition to a sentence of imprisonment and fine. If then a person be tried at one time for two or more offences, one of which involves the punishment of whipping in lieu of, or in addition to, the punishment of imprisonment, what sufficient reason is there that he should not be sentenced in each case to the penalty prescribed for each offence? If a man have committed theft, and, in resisting a neighbour of the party robbed, he inflict grievous hurt, why should the offender not suffer for both offences? It is clear that he might be punished with imprisonment for the theft,

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and with imprisonment for the grievous hurt; and under the provisions of section 46, Criminal Procedure Code, the period of imprisonment in one case would commence from the close of the period in the other; but why, if whipping have been added to the punishment prescribed by the Penal Code, should not the offender be punished with whipping in lieu of other punishment for the first offence, and with imprisonment for the second? or if he have been convicted of theft more than once, why should he not be punished with whipping, in addition (section 3, Act VI of 1864) to any other punishment prescribed by the Code, and also to imprisonment for the other offence? and if the punishment in the first case be whipping, in addition to imprisonment, the imprisonment awarded in the second case would, under the provisions of section 46 of the Criminal Procedure Code, commence on the expiration of the other. Reading, as I do, Act VI of 1864 as part of the Penal Code, I do not confess that I see no sufficient reason for holding that, if a Magistrate proceeds under section 46 of the Code of Criminal Procedure, he must confine his sentence strictly within its provisions.

BAYLEY, J.—I think the Magistrate's acts are not illegal. The Whipping Act does not preclude punishment for those offences to which it is applicable, such as theft here. And because a man is punished according to law with whipping for theft, I do not see why he should not be punished for assault and grievous hurt when he commits those distinct and separate offences as in this case. I see nothing in the law against this view.

KEMP, J.—I think that the view taken by the late Chief Justice, Sir Barnes Peacock, and by Mr. Justice Phear in *Nassir* v. *Chunder* (1) is correct.

MACPHERSON, J.—I remain of the opinion which I expressed at length in the case of *Nassir* v. *Chunder* (1), and I have no doubt in my own mind that the sentences passed on the prisoner Gaur Chandra are legal.

(1) Reference by the Sessions Judge of Mymensing under Circular Order (No. 17, dated 17th June 1863), March 12th 1868.

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MITTER, J.—I am of opinion that the view taken by the Chief Justice and Mr. Justice Macpherson is correct. The reasons in support of that view have been so fully gone into by those learned Judges that it would be mere waste of time on my part to repeat them.

PHEAR, J.—I regret very much that I cannot bring myself to agree with the majority of my colleagues in this case. I am unable to perceive error in the view taken by Sir Barnes Peacock and myself on the occasion which has been referred to. It still appears to me that a multiply punishment inflicted by one sentence is essentially different in its character and effect from the aggregate result of the punishments, which are its factors, supposed to be separated from each other by an interval of time. I take it that no Judge of sound discretion, if called upon to accumulate punishments for different offences, would award each punishment precisely in the same manner as he would if the corresponding offence where alone under his consideration. For instance, if a man was convicted at one time of three thefts, for each of which, if it stood single, one year's imprisonment might be an appropriate punishment, I suppose that the convicting officer would not for a moment think that therefore, the aggregate of three years was the right punishment for the three offences. The whole of section 46 of the Criminal Procedure Code, and especially the proviso in the latter part of it, appear to me to show beyond question that the Legislature held this view, which I endeavour to express, namely, that a punishment effected by accumulation of penalties is not merely a set of separate punishments. Then also the words of the Whipping Act seem to me to make it as plain as can be that the Legislature, in giving Criminal Courts the power which they did not before possess of inflicting the punishment of whipping, intended, for reasons which may be easily conjectured, carefully to limit its application. I cannot see in the Act the smallest indication that the Legislature contemplated whipping, as by any possibility becoming, under the Act, an element in any punishment, except under the circumstances which are there in expressly mentioned. On the contrary, the language of the

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Act, coupled with the elaborately detailed form of its various provisions, leads me to think that the Legislature only meant that whipping should be associated with another punishment, in the particular cases, of which express mention is made. But if the Whipping Act does in truth apply not only to single sentences but also to each constituent factor of an accumulated sentence, such as is the subject of section 46 of the Criminal Procedure Code, whipping may be lawfully associated with other punishments even in cases of minor offences not committed after previous conviction; a result which certainly seems to me diametrically opposed to the unmistakeable spirit of the Act itself. Thus, if a boy were convicted of stealing two mangoes belonging to one owner, he could not be both whipped and also imprisoned; the whipping if inflicted, must, by the words of the Act, be in lieu of any other punishment; but if it were proved that one mango belonged to one owner, and the second to another, the Magistrate might, on the principle now maintained convict for two offences, and in this way both imprison and whip. I can't believe that the Legislature, against the very spirit of the Act, intended to leave a discretion of this sort to the judicial officer. Before the Whipping Act was passed, he certainly had not uncontrolled discretion in the matter of accumulating such punishment as then existed. Section 46 expressly restricted him in his respect; and I think the consequence is that, since the passing of that section at any rate, he has had no other power of accumulating punishments than is given him either by that or by some subsequent enactment. In the case which has been cited, I gave at length my reasons for coming to the conclusion that the punishment of whipping was not included among the punishments which a judicial officer could accumulate in the event of simultaneous conviction for sevral offences. To the opinion which I then expressed, I still adhere, and therefore I need not now discuss this question again.