

ORIGINAL CRIMINAL.

Before Mr. Justice Woodroffe.

EMPEROR

v.

SALIMULLAH.*

1912

Jan. 23.

High Court, jurisdiction of—Jurisdiction of the High Court to try a Native Indian seaman for an offence committed on board a British vessel on the high seas—Stoppage of the vessel thereafter at intermediate ports—Accused brought to Calcutta in custody—Applicability of English law to the offence and the charge, and of Indian law to the procedure and sentence—Courts (Colonial) Jurisdiction Act (37 & 38 Vict., c. 27), s. 3—Merchant Shipping Act (57 & 58 Vict., c. 60), ss. 684, 686.

The High Court of Calcutta has jurisdiction, in its Original Criminal Side, under sections 684 and 686 of the Merchant Shipping Act (57 & 58 Vict., c. 60), to try a Native Indian seaman for murder or manslaughter committed on board a British vessel on the high seas, who is brought to Calcutta under custody, notwithstanding that the vessel touched, after the commission of the offence, at intermediate ports in the course of the voyage.

The offence should be tried, and the charge framed, under the English law, but the procedure at the trial and the sentence must be regulated by the law of India.

Section 3 of 37 & 38 Vict., c. 27, does not deal with the trial of the case, but with the sentence after conviction.

Queen-Empress v. Sheik Abdool Rahiman (1) and *King-Emperor v. Chief Officer of the "Mushtari"* (2) dissented from.

THE prisoner, Salimullah, was tried at the sixth Criminal Sessions of the High Court on the 23rd January 1912. He was a Native Indian subject and employed as a fireman on board the *Clan Lamont*, a British ship, on the voyage from Liverpool to Calcutta. It appeared that, on the 16th December 1911, at 5 A.M., while the vessel was proceeding in the

* Original Criminal Jurisdiction.

(1) (1889) I. L. R. 14 Bom. 227. (2) (1901) I. L. R. 25 Bom. 636.

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Red Sea, the 2nd Engineer, William McCrea, asked the prisoner to clean the furnace. The latter replied that he would do so after he had taken a drink of water from a can which he took up for the purpose, but the deceased insisted on his doing the work first. Salimullah refused to comply with the order, whereupon McCrea abused him, snatched away the water can from his hands, caught him by the neck and kicked him. The prisoner thereupon picked up a shovel lying near him and struck the deceased with it, causing a fracture of the skull, from the effects of which he died next morning. The vessel arrived at Perim on the evening of the 17th, and the local Health Officer held the *post mortem* examination. On the next day an enquiry was made by a Magistrate on board, and the Health Officer was examined as witness in the presence of the prisoner who declined to cross-examine him. The vessel with the prisoner proceeded on its journey and touched at Aden and Tuticorin. At the latter port he was made over to the police and produced before a Magistrate, who remanded him to custody. The Tuticorin Police then took the prisoner to Madras, from which place he was brought to Calcutta in police custody. He was placed before the Chief Presidency Magistrate, who, after holding a preliminary enquiry, committed him to the Criminal Sessions.

The prisoner was arraigned on the following indictment with two counts:—

(i) That he, the said Salimullah, on the 16th December, in the year of our Lord nineteen hundred and eleven, on board the British ship *Clan Lamont*, then and there being upon the high seas and within the Admiralty jurisdiction of this Court, did feloniously, wilfully and of malice aforethought, kill and murder one William McCrea, against the term of the Statute in such case made and provided, and against the peace of our Lord the King and Emperor, his Crown and dignity.

(ii) That he [*repeating the words of the first count*] did feloniously kill and slay the said William McCrea; etc.

Mr. Asghur, for the prisoner, raised a preliminary objection before the Jury were empanelled and the indictment read to the prisoner: This Court has no jurisdiction to try the case, as the offence was committed on the high seas and the vessel touched at Perim, where certain proceedings were held against the accused, and also at Aden and Tuticorin. He ought to have been tried by the first British Court that had Admiralty jurisdiction at the port where the ship touched. The offence and the charge should be laid under the Indian Codes, and not the English law: see Starling's Indian Criminal Law, 5th edition, pages 9 to 13; Ayyar's Criminal Procedure Code, page 19. The prisoner is a Native Indian. Since the enactment of 37 & 38 Vict., c. 27, s. 3, the Legislature intended that such persons should be tried under the Penal Code as the substantive law of India, though included in the term "British subject" as used in 57 & 58 Vict., c. 60, s. 686, and that the charge should be framed according to the Criminal Procedure Code: *Queen-Empress v. Sheik Abdool Rahiman* (1), *King-Emperor v. Chief Officer of the "Mushtari"* (2). The cases of *Queen-Empress v. Barton* (3) and *Queen-Empress v. Gunning* (4) were those of European British subjects; see also s. 4 of the Penal Code.

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The Standing Counsel (Mr. B. C. Mitter), for the Crown. The offence and the indictment should be governed by the English law; see 57 & 58 Vict., c. 60, s. 686. The proviso to 37 & 38 Vict., c. 27, s. 3, applies only after conviction.

WOODROFFE J. Learned counsel for the accused, before the charge was read, contended, *first*, that

(1) (1889) I. L. R. 14 Bom. 227. (3) (1889) I. L. R. 16 Calc. 238.
 (2) (1901) I. L. R. 25 Bom. 636. (4) (1894) I. L. R. 21 Calc. 782.

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this Court had no jurisdiction to try the case, and, *secondly*, that if it had, the Penal Code and not the English law was the substantive law applicable. The first contention is based on the fact that after the offence, the ship touched at the ports of Perim, Aden and Tuticorin. Assuming, for the sake of argument, though I do not consider the point, that the accused might have been tried at any of those places, section 684 of the Merchant Shipping Act (57 and 58 Vict., c. 60) provides for jurisdiction in any place in which the offender, or person complained against, may be. The accused is now here, however he may have come here (though it is to be noted that this port was that of the destination of the ship); and I hold, therefore, that this Court has jurisdiction to try him.

Learned counsel's argument on the second contention assumes that the question he now raises could not have arisen prior to the Court (Colonial) Jurisdiction Act (37 and 38 Vict., c. 27, s. 3), and that even after that Act the English law would be applicable if the accused had been by nationality British. The accused who is a British subject is, however, an Indian, native of Sylhet. Learned counsel, therefore, contends that, so far as such subjects are concerned, the law was altered by Courts (Colonial) Jurisdiction Act, and he relies upon the decisions of the Bombay High Court in *Queen-Empress v. Sheik Abdool Rahiman* (1) and *King-Emperor v. Chief Officer of the "Mushtari"* (2). His contention is that the substantive law varies with the nationality of the accused. The correctness of the Bombay decisions has been doubted by Mr. Mayne in his *Criminal Law of India* for reasons with which I agree (3rd edition, s. 76). As he states, and I agree, section 3 of the Courts (Colonial) Act does not deal with the trial of the case, but with

(1) (1889) I. L. R. 14 Bom. 227. (2) (1901) I. L. R. 25 Bom. 636.

the sentence after conviction, the statute adopting the local machinery for punishment to the English definition of crime. Moreover, the very terms of section 3 is against the contention now raised, in so far as it provides for the case of an offence which is not punishable by the law of the Colony in which the trial takes place. This negatives the view that the law governing the offence is the substantive law of the Colony. Section 686 of 57 and 58 Vict., c. 60, speaks of a "British subject," which includes an Indian subject. Reference has been made to section 4 of the Penal Code. It is possible to give this section a construction which is not inconsistent with the English Statute, but in any case it could not, assuming that the Indian Legislature had jurisdiction in this matter, affect the specific Statute of Parliament.

I hold, therefore, that the substantive law applicable to the case is the English law, and that the charge has been rightly framed in this respect. The accused will, therefore, be called upon to plead to the charge, and the trial will proceed.

[The trial proceeded, and the Jury ultimately found the prisoner not guilty on the first, but guilty on the second, count. Mr. Asghur contended that the sentence should be passed under the English law, as no section of the Penal Code corresponded to the offence of which the prisoner was found guilty. WOODROFFE J. reserved judgment; and considering that the offence found corresponded most nearly to the second part of section 304 of the Indian Penal Code, his Lordship sentenced him to four years' rigorous imprisonment thereunder.]

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