Privy Council Appeal No. 15 of 1944

Pandit Kishori Lal – – – – – – – – *Appellant*

v.

The King-Emperor – – – – – – – – *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH DECEMBER, 1944

Present at the Hearing:

THE LORD CHANCELLOR
LORD RUSSELL OF KILLOWEN
LORD PORTER
LORD GODDARD
SIR MADHAVAN NAIR

[*Delivered by* LORD GODDARD]

On 7th October, 1930, the appellant was convicted before the Special Tribunal set up under Ordinance III of 1930 of certain offences, including those of waging war against the King, contrary to section 121 of the Indian Penal Code, and of murder, contrary to section 302. For these offences he was sentenced to transportation for life which is the only sentence, other than death, which can be awarded for these two crimes. After conviction he was imprisoned in the Central Jail at Multan and in January, 1936, was transferred to the Central Jail at Lahore. On 29th August, 1932, the Home Secretary to the Government of the Punjab wrote to the Inspector-General of Prisons saying that the Governor in Council agreed that the appellant, on the score of his crime, was unsuitable for transportation to the Andamans, adding that " he cannot be deported as a terrorist as the Government of India has not so far addressed any communication authorising the Punjab Government to deport terrorists there ". The Andamans is the only place outside the mainland of India to which convicts sentenced to transportation are sent and it is not in dispute that this letter signified the intention of the Government not to transport the appellant overseas but to keep him imprisoned in India. In fact, he has ever since been kept in the Central Jail at Lahore, and has there been dealt with in the same manner as if sentenced to rigorous imprisonment. His sentence has never been commuted under section 55 of the Penal Code, or section 402 (1) of the Code of Criminal Procedure, to one of rigorous imprisonment. While there is no section either in the Penal Code, or in the Code of Criminal Procedure, which says in terms that no sentence of rigorous imprisonment is to exceed 14 years, it is the fact that in no case where rigorous imprisonment is prescribed as the punishment is the maximum term longer than 14 years and, by a proviso to section 35 (2) of the latter Act, consecutive sentences of imprisonment cannot amount in the aggregate to more than 14 years. So it can be said with truth that when the Code enacts that an offence shall be punishable by rigorous imprisonment as the sentence it cannot exceed that period. The only sentence known to the law which can exceed

14 years is one of transportation for life and, with two exceptions where transportation is a part of the sentence, the term is always for life. Convicts serving this sentence may be granted remission for good conduct, and for the purpose of calculating remission in the case of life sentences, it appears that in India they are treated as sentences of 20 years. This is no doubt the reason why section 57 of the Code provides that for calculating a fractional part of a life sentence it should be treated as one of 20 years.

On the 1st July, 1943, the position was that the appellant had earned remission and, if the amount thus earned were added to the term he had actually served, the aggregate would have exceeded 14 years but would not have exceeded 20 years. On that date he applied to the High Court at Lahore for an order in the nature of a habeas corpus under section 491 of the Code of Criminal Procedure, claiming that he had justly served his sentence and should therefore be released. His application was refused by Monroe J. on 13th July. On appeal the High Court held that they had no jurisdiction to entertain it as being one in relation to a criminal matter, and it is conceded that this view was correct. Subsequently, special leave to appeal to His Majesty in Council from the order of Monroe J. was granted as it was clear that a question of importance and some difficulty was involved.

The appellant's main contention was, and is, that as he has all along been subjected to rigorous imprisonment he cannot be made to serve longer than a term, which, aggregated with the period of remission earned, amounts to 14 years, that being the maximum term of rigorous imprisonment permitted by law. He also contends that the Government by causing him to be dealt with in the same manner as if sentenced to rigorous imprisonment must be deemed to have commuted his sentence under section 55 of the Penal Code. The contention of the Government is that they can confine a prisoner sentenced to transportation in any prison appointed by them for that purpose there to be dealt with as though sentenced to rigorous imprisonment, but that this does not affect the length of the sentence unless it has been commuted, and the present appellant's sentence never has been commuted. It is therefore necessary to examine the various statutory provisions dealing with the sentence of transportation.

Section 53 of the Penal Code sets out six different punishments to which offenders are liable. The second of these is transportation and the fourth imprisonment of two descriptions, rigorous and simple. As already stated, where the Penal Code prescribes transportation as the punishment, the sentence, with two exceptions, must be for life. By section 55, in every case in which a sentence of transportation for life shall have been passed, the Government of India or the Government of the place within which the offender shall have been sentenced, may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding 14 years. Section 58 provides that in every case in which a sentence of transportation is passed the offender, until he is transported, shall be dealt with in the same manner as if sentenced to rigorous imprisonment, and shall be held to have been undergoing his sentence of transportation during the term of his imprisonment. Were these the only statutory provisions dealing with the matter, there would be much force in the argument that section 58 should be read as providing merely for the temporary or transitory detention and treatment of an offender while arrangements were being made for his transportation beyond the seas. If the history of the sentence be examined there is no doubt that when first enacted transportation meant transportation beyond the seas. When framing the Penal Code, the draughtsmen undoubtedly intended this sentence to remain as one whereby those on whom it was passed should be sent overseas. This appears in the introduction to the Code, the author of which was Mr.—afterwards Lord—Macaulay, then Legal Member of Council and a principal draughtsman of the Act. The Code was drafted about 1836 but was not enacted until 1860 and at that time also the sentence involved the convict being sent out of India. In 1836 transportation was a common sentence in England for felony and one reason for thinking that

section 58 was intended by the authors of the Code to provide only for temporary detention of prisoners awaiting transportation is that the English Act 24 Geo. IV Ch. 84, which consolidated the law of this country relating to transportation, contained a very similar provision. Shortly stated that Act provided that the sentence should always be one of transportation or banishment beyond the seas; that places on land or vessels in the river (commonly called the hulks) should be appointed for the confinement of prisoners until they could be placed on a convict ship and that until they could be removed to such places they were to be kept to hard labour in the common jail or house of correction and the time spent there was to be counted towards their sentence. Opinions, however, on matters of penology change from time to time in all communities, and no one doubts the competency of the legislature to adopt and provide for new and enlightened methods in the treatment of prisoners and management of penal establishments, even if the result be to change entirely the character of the punishment from that which has hitherto prevailed. In England transportation beyond the seas ceased as a punishment in 1854. In India it is still part of the penal system, but Acts passed since the Penal Code have effected so radical a change in the law relating thereto that whatever may have been the case in 1860 section 58 can no longer be construed as providing only for the transitory detention of prisoners awaiting conveyance to a penal settlement outside India. A sentence of transportation no longer necessarily involves prisoners being sent overseas or even beyond the provinces wherein they were convicted. The first provision to notice in this respect is section 368 (2) of the Code of Criminal Procedure, 1898, which enacts that no sentence of transportation shall specify the place to which the person sentenced is to be transported. Then comes the Prisoners Act of 1900 as amended in 1903 which, in the opinion of their Lordships, is the decisive statute on the point. Section 29 in its amended form provides as follows:—

> " (1) The Governor-General in Council may by general or special order, provide for the removal of any person confined in a prison . . .
>
> (*b*) Under, or in lieu of, a sentence of imprisonment or transportation . . . to any other prison in British India.
>
> (2) The Local Government and subject to its orders and under its control the Inspector General of Prisons may in like manner provide for the removal of any person confined as aforesaid in a prison in the province to any other prison in the province ".

By section 31, the Governor in Council may order the removal of a person sentenced to transportation from the prison in which he is confined to any other prison in British India. By section 32, as amended in 1920, the Local Government may appoint places within the province to which prisoners under sentence of transportation shall be sent and the Local Government or an officer authorised by them shall give orders for the removal of such persons to the places so appointed except where sentence of transportation is passed on a person already undergoing transportation under a sentence previously passed for another offence. Since 1937, all the above powers can now be exercised by Provincial Governments.

The effect of the concluding words of section 32, sub-section 1, seems to be that if a prisoner has been actually transported and then is sentenced on a subsequent charge he is to remain where he is and not be removed thence to a place within the province. The Central Jail at Lahore, in which the appellant is confined, is one of the prisons constituted as a place for the detention of transportation prisoners. These sections make it plain that when a sentence of transportation has been passed it is no longer necessarily a sentence of transportation beyond the seas. Nowhere is any obligation imposed on the Government either of India or of the Provinces to provide any places overseas for the reception of prisoners. It appears that for many years the only place to which they have been sent is the Andaman Islands, which are now in Japanese occupation. Their Lordships have been referred to various orders and directions of an administrative and not a legislative character showing what prisoners are, and are not,

regarded as fit subjects for transportation thereto, and showing also that nowadays only such of those prisoners sentenced to transportation as may volunteer to undergo transportation overseas are sent to those islands. Learned commentators on the criminal law of India, in particular Lord Macaulay, in the introduction to the Penal Code to which reference has already been made, have pointed out that a sentence of transportation is one likely to be regarded with particular terror by Hindoos, largely because of their dread of crossing "the black water", the loss of caste which a journey overseas entails and of the uncertainty whether they will ever see their homes again. No doubt, therefore, the sentence has been preserved for its deterrent effect and because in certain cases it may be both useful and desirable to send convicts to the islands. But at the present day transportation is in truth but a name given in India to a sentence for life and, in a few special cases, for a lesser period, just as in England the term imprisonment is applied to all sentences which do not exceed two years and penal servitude to those of three years and upwards. A convict sent to penal servitude may nowadays serve his sentence either in a prison known as a convict establishment or in an ordinary local prison and in the latter he will be subject to exactly the same discipline, conditions of labour and treatment generally as those sentenced to imprisonment. So, in India, a prisoner sentenced to transportation may be sent to the Andamans or may be kept in one of the jails in India appointed for transportation prisoners where he will be dealt with in the same manner as a prisoner sentenced to rigorous imprisonment. The appellant was lawfully sentenced to transportation for life; at the time when he made his application to Monroe J., he was confined in a prison which had been appointed as a place to which prisoners so sentenced might be sent. Assuming that the sentence is to be regarded as one of 20 years, and subject to remission for good conduct, he had not earned remission sufficient to entitle him to discharge at the time of his application and it was therefore rightly dismissed but, in saying this, their Lordships are not to be taken as meaning that a life sentence must and in all cases be treated as one of not more than 20 years or that the convict is necessarily entitled to remission.

A further point was taken by Mr. Pritt on behalf of the appellant to which brief reference may be made although, in view of the opinion of their Lordships on the main question, it has now become immaterial. On the assumption that the sentence was to be regarded as one of not more than 14 years' rigorous imprisonment, he contended that taking into account the remission earned, the appellant would have been entitled to be discharged at the time when he made his application to the learned Judge under sub-paragraph 2 of the Government of India Resolution No. 234-245 of 12th July, 1910, and Provincial Government endorsement No. 236 of 25th August, 1910, reproduced as paragraph 647, sub-paragraph 2, in the Punjab Jail Manual. In view of sub-paragraph 1*c* the Board caused an enquiry to be made of the Punjab Government whether any order had been passed by them forbidding the prisoner's release. In reply the Government referred to a letter of the 24th March, 1942, from the Deputy Secretary to the Government Home Department to the Inspector-General of Prisons, in which the former requested that the roll of the convict might be resubmitted for the further consideration and orders of Government in the first week of March, 1943. That is not an order under the paragraph to which reference has been made, and if the sentence had in law to be regarded as one of 14 years' rigorous imprisonment it appears to their Lordships that the prisoner would have been entitled to be discharged. But, for the reasons given, their Lordships are of the opinion that at that time he was in lawful custody, and still is, and they will humbly advise His Majesty that this appeal should be dismissed.

(38538) Wt. 8060—28 190 1/45 D.L. G. 338

In the Privy Council

PANDIT KISHORI LAL

v.

THE KING-EMPEROR

DELIVERED BY LORD GODDARD

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1945