

Queen v Weaver [1889] FJHCWP 1; [1889] 1 FLR 155 (19 August 1889)

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HIGH COMMISSIONER'S COURT FOR THE WESTERN PACIFIC

[CRIMINAL JURISDICTION.]

THE QUEEN v. WEAVER.

1889 *Aug.* 16, 19.

Royal Prerogative - Jurisdiction - Foreign Jurisdiction Act, 1843 - Pacific Islanders Protection Acts, 1872, 1875 - Western Pacific Order in Council, 1877.

Her Majesty the Queen has jurisdiction and power by virtue of Her Royal prerogative and of inherent right, independently of the Foreign Jurisdiction Acts and the Pacific Islanders Protection Acts, 1872 and 1875, to make laws for the government of Her subjects within the Western Pacific Islands by Orders in Council.

Further, that the Pacific Islanders Protection Acts and the Orders in Council issued in respect of them are not restricted in their operation to offences committed by

British subjects against Pacific Islanders, but apply also to offences committed by British subjects *inter se*.

This was a motion in arrest of judgment for want of jurisdiction in the case of Henry Ernest Weaver, a British subject, late supercargo on board the schooner *Colonist*, of Sydney, who had on 15th August, in the High Commissioner's Court for the Western Pacific, sitting at Suva, Fiji, consisting of the Chief Judicial Commissioner and four assessors, been convicted of the wilful murder of William Greenlees, master of the said schooner, on the 22nd May, 1889, in the island of Sandwich, New Hebrides, in the Western Pacific.

Mr. Scott appeared in support of the motion.
The Acting Attorney-General (Mr. Solomon) for the Crown.

The facts and arguments sufficiently appear from the judgment.

The case was argued on the 16th August, and the Court reserved its decision and on the 19th gave judgment, as follows:-

H.S. BERKELEY, Chief Judicial Commissioner. This was a motion in arrest of judgment for want of jurisdiction on the grounds that it appears on the face of the record that the prisoner and the deceased were both British subjects, and that it appears on the face of the record that the offence of which the prisoner has been convicted was committed on a British ship in the harbour of Havannah, Sandwich Island, and not in the island of Sandwich as charged in the indictment. These are the grounds urged and the only ones I am called upon to consider. In support of the first ground, it is said that the power of Her Majesty in Council to make the Western Pacific Orders in Council is derived from the Pacific Islanders Protection Acts, 1872 and 1875, and that these are intended to apply to British subjects in relation to their conduct towards Pacific Islanders only, and do not confer any power upon Her Majesty to confer upon any Court jurisdiction to try British

subjects for offences against any persons other than Pacific Islanders; and consequently that, in so far as the Western Pacific Orders in Council affect to confer upon the High Commissioner's Court jurisdiction and power to try a British subject for the murder of another British subject, such Orders in Council are *ultra vires* and, therefore, void; and it is urged that a British subject can only be deprived of the right to be tried by a jury of his equals by an Act of Parliament or of some other duly constituted legislative body and not by Order in Council.

In support of the second ground I cannot say that anything has been urged that is entitled to weight; and if this Court has jurisdiction to try a British subject for the murder of another British subject, I do not think there is anything in the second ground upon which this motion is based; for, as the application of the Order is expressly extended by Article 6 of the Western Pacific Order in Council, 1877, to British ships in the waters of the Western Pacific, an offence committed on a British ship in a harbour within the waters of the island of Sandwich may, I think, not improperly, be charged in the indictment as having been committed in the island of Sandwich. It is perhaps a statement not quite colloquially correct but sufficiently certain and accurate for the purposes of the indictment.

The remaining question is whether the offence of murder committed within the Western Pacific is, if the murderer and the murdered person are both British subjects, triable in the Court of the High Commissioner for the Western Pacific. That is the question which Mr. Scott, on behalf of the prisoner has raised and which he asks me to decide in the negative; and, in this judgment, I decide nothing beyond that general question. With respect to the latter portion of the argument addressed to me in support of the first ground upon which the motion rests, I may say at once that the constitutional principle, which I presume Mr. Scott had in his mind - namely, that on the discovery and settlement of an uninhabited country by English subjects, all the English laws then in force which are the birth-right of every subject are immediately in force there, - has no application to the condition of things that exists in the Western Pacific; and, even when applicable, must be understood with many and great restrictions.

With respect to the former portion of the first ground, the question is whether Her Majesty has any power to make Orders in Council affecting her subjects in the Western Pacific; and, if she has, whether such Orders in Council must be limited or

may be unlimited in their scope and application to British subjects. Mr. Scott contends that any Orders must be limited in their scope to the relations between British subjects and Pacific Islanders; and he relies for this proposition on the contention that the Western Pacific Orders in Council are founded entirely on the Pacific Islanders Protection Acts. I do not concur in that proposition nor do I think that the authority of Her Majesty to make Orders in Council for the government of Her subjects in the Western Pacific is dependent upon the Pacific Islanders Protection Acts or upon any Act of Parliament; and I am of opinion that Her Majesty the Queen possesses this power by inherent prerogative right, the exercise of which has been recognised and the right to the exercise of which is strengthened by the Pacific Islanders Protection Acts and the Foreign Jurisdiction Acts. It cannot be disputed that it is within the power of the sovereign to declare sovereignty over the islands in the Western Pacific should she be pleased to do so, and it follows that if complete sovereignty and jurisdiction over the islands and their inhabitants and the residents for the time being therein may be declared, a sovereignty - a jurisdiction - of a limited character and for certain purposes may equally well be declared. Now, for the purposes of affording protection to the inhabitants of the islands of the Western Pacific and for the further purpose of the better government and control of Her Majesty's subjects in those islands, Her Majesty has been pleased in virtue of Her royal prerogative to declare that she has power and jurisdiction within certain of these Western Pacific Islands. Now the sovereign may, in virtue of Her royal prerogative, exercise in every place where she has jurisdiction the right of appointing judicial and other officers, and, in all places which have been acquired by cession or conquest, the sovereign possesses the sole power of legislation until that power is parted with by the grant of a local legislature. Now this assertion by Her Majesty that she possesses power and jurisdiction within the Western Pacific Islands is, for the purposes of legislation, equivalent to the actual conquest by or cession to Her Majesty of these islands. This is expressly recognised both by the Foreign Jurisdiction Acts and by the Pacific Islanders Protection Acts. The Foreign Jurisdiction Act, 6 and 7 Vict. c. 94, after reciting that doubts had arisen how far the exercise of Her Majesty's jurisdiction in places beyond Her dominions was controlled by the laws and customs of England, enacts that Her Majesty may exercise any power or jurisdiction which she has within any country or place not Her dominions in the same and as ample a manner as if such power or jurisdiction had been acquired by cession or conquest. Having, then, jurisdiction in the Western Pacific, Her Majesty in Council may, of inherent right, until the establishment of a legislature, make laws for the government of Her subjects within the Western Pacific Islands, and the constitutional method for making laws in such a case is by Order in Council; and every subject coming within the islands is, for the time being, subject to, such laws and amenable to the Courts of justice established under those laws for any offences committed against such laws. Now, by the Western Pacific Order in Council, 1877, the Criminal Law of England is made to apply to the Western Pacific; and by the same Order, Her Majesty has appointed a Governor over her

subjects in the Western Pacific under the title of High Commissioner and has established a High Court of Judicature with cognisance of *all* criminal matters arising within the Western Pacific; and the jurisdiction of such Court extends over all British subjects and includes the power to take cognisance of *all* crimes and offences committed by Her Majesty's subjects within any of the islands or in an harbour of any of the islands. I have no doubt, therefore, that the offence of which the prisoner has been convicted is cognisable in this Court. This motion in arrest of judgment must, therefore fail and the prisoner must be brought up for sentence.^[*]

Motion dismissed.

^[*] Sentence of death was passed, but was afterwards commuted to one of penal servitude for life.