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TABLE OF CONTENTS.

APPENDIX.

TABLE OF CASES.

INDEX.

A

B

C

9

10

I

J

K

L

M

12

O

P

R

S

T

U

W

Pleader, Pyapon.

Pleader, Pyapon.

Criminal Procedure—35, 235.

Before A. M. B. Irwin, Esq.

KING-EMPEROR *v.* NGA SAN DUN.

Criminal Revisi on No. 24 of 1904. January, 29th.

Held,—that distilling spirit and possessing the spirit obtained by such distillation are not distinct offences within the meaning of section 35, Code of Criminal Procedure, and a double sentence is prohibited by sectio 1 71, Penal Code.

Although under section 235 (1), Code of Criminal Procedure, separate convictions for the two offences are le gal, yet i: is neither necessary nor desirable to convict for possessing spirit when the manufacture is proved.

References:—

1, U. B. R., 1892—96, page 93.
1, L. B. R., page 33 (1900).

See Penal Code, page 1.

Criminal Procedure—35, 233 23, 53 7.

Criminal Revision No. 8440 1903. January 14th, 1904.

Before A. M. B. Irwin, Esq.

KING-EMPEROR v. ASGAR ALI.

The accused was convicted at one trial of (1) house-breaking by night with intent to commit theft on the night of the 27th August under section 457, (2) theft at the same time in the verandah in a different part of the same building under section 379, and (3) theft in a building used for the custody of property on the night of the 29th August, under section 380.

Held—that the separate sentence for theft of the shoes was not legal (section 35, Criminal Procedure Code).

Held also—that the joinder of the two charges under sections 457 and 380, Indian Penal Code, was illegal.

Held also—that the misjoinder could not be cured by section 537, Code of Criminal Procedure.

References:—

1, Upper Burma Rulings, 1892—95, p. 33.
2, I. L. R., 25, Mad., p. 61 (1901).

The facts found are that Asgar Ali committed house-breaking by night on the night of 27th August or in the small hours of the morning of 28th and stole some precious stones from Persutum, that at the same time he stole a pair of shoes the property of Waizuddin which he found in the verandah in a different part of the same building, and that on the night of 29th August he stole a pony the property of Law Shwin from a building used for the custody of property. On these facts he was convicted at one trial of (1) house-breaking by night with intent to commit theft under section 457, (2) theft under section 379, and (3) theft in a building used for the custody of property under section 380. He was sentenced to one year and 11 months' imprisonment on the first charge, one month on the second charge, and two years on the third charge. I have placed the offences in chronological order; they are not so in the record. It is not clear why the second charge (theft of the shoes) was not under section 380. The verandah of a house is part of the house and I should say that shoes stolen in the verandah of a house were stolen in the house.

The separate sentence for theft of the shoes does not appear to me to be legal. Asgar Ali, according to the finding broke into the house with intent to commit theft, and stole precious stones and shoes therein. This is exactly the case specified in the illustration to the explanation to section 35, Code of Criminal Procedure, and therefore the separate sentences under sections 457 and 379 are not justified by section 35.

But the most serious error consisted of trying the charges of house-breaking by night and theft of the pony at one trial. The general rule, laid down in section 233, Code of Criminal Procedure, is that every

LACHMANAN CHETTY v. KING-EMPEROR 1904.

seem to be confined to inquiry and orders regarding the offence to which the report relates, namely, the theft. I do not find in the chapter any provisions authorizing a Magistrate to institute proceedings against the informant. The Headquarters Magistrate's final order purports to be made under section 476, Code of Criminal Procedure. That section provides for a preliminary inquiry; why then did the inquiry purport to be made under a different section? This consideration ought to have made the Magistrate reflect before making the order. Section 476 empowers a Magistrate to inquire into an offence under section 211, Penal Code, if such offence is committed before him or brought under his notice in the course of a judicial proceeding, and to send the accused in custody to a Magistrate of the first class. The alleged offence under section 211 was not committed before the Headquarters Magistrate. Neither was it brought under his notice in the course of a judicial proceeding as defined in section 4 (*m*). Taking evidence on oath was no part of the proceeding, and evidence would not ordinarily be taken on reading a police report under section 173.

It follows therefore that the Magistrate had no authority to take any action under section 476. This objection has not been taken by the applicant, who only asks that the order be set aside on the grounds that the complaint made to the Police was substantially true, and that the Magistrate did not exercise a prudent discretion in directing his prosecution. It remains then to be considered whether apart, from section 476, the action taken by the Magistrate was lawful, and if so, whether there are any sufficient grounds for setting aside the order.

The Headquarters Magistrate is a Magistrate of the first class, and under section V of the Schedule to the Upper Burma Criminal Justice Regulation, he has power to take cognizance of offences under all the clauses of section 190 (*1*). It appears to me that what the Magistrate did was substantially to take cognizance of an offence which appeared to him to be disclosed by the Police report, although the Subdivisional Police Officer did not suggest that any such offence was disclosed. When a Magistrate takes cognizance of an offence under clause (*c*) the special protection which the law affords to the accused is laid down in section 191. The Magistrate went farther than that section goes, by both holding a preliminary inquiry and transferring the case to another Magistrate for trial of his own motion.

In the case of *Prankristo Pal** a bench of the Calcutta High Court refused to interfere with an order of a Magistrate purporting to be made under a section of the Code which did not justify it, because the magistrate really had legal power to make the order under another section of the Code. A Full Bench of the same Court, in *Queen-Empress* v. *Sham Lal*†, held that a District Magistrate on perusal of a police report, had jurisdiction to direct a prosecution of the informant for making a false complaint. I hold that the Magistrate's action in the present case was lawful under sections 190 and 191, Code of Criminal Procedure. In the last mentioned case it was held that a Magistrate should not take cognizance of an alleged offence under section 211

* 14 W. R., page 41 (1870.) † I. L. R. 14 Cal., page 707 (1887).

until the alleged offender has had an opportunity of substantiating the original charge. In the present case the applicant has had a very full opportunity of doing so.

In *Jagat Chandra Mozumdar* v. *Queen-Empress** the learned Judges said:

"It is only in very exceptional instances that this Court should as a Court of Revision interfere with the action of a Subordinate Court in respect of any pending case, and especially when the case has reached the stage where a charge has been drawn and only the defence of the accused remains to be heard. We do not desire to lay down any hard and fast rules on the subject. But speaking generally it seems to us to be inadvisable to interfere in a pending case, unless there is some manifest and patent injustice apparent upon the face of the proceedings and calling for prompt redress."

The charge was one of fabricating false evidence, and the applicant was not one of the persons accused in the complaint. The learned Judges proceeded:

"We have considered the whole of the evidence for the prosecution, and we fail to see that it discloses any act of the accused which can be interpreted so as to bring him within the four corners of the charge."

On this ground the proceedings were quashed. Applying the principles in that case to the present case, I find there is distinct evidence that the Chetti had not received 20,000 bricks as stated in his information, that he had more than once told Maung Po to sell the bricks to others, and that he had seen the cartmen taking away bricks several times without interfering with them. There is some evidence that he had taken delivery of 5,000 bricks, but no evidence that would substantiate a charge of theft. I express no opinion on the question whether the evidence is sufficient to prove that applicant made a false charge, but there is no manifest or patent injustice on the face of the record. If the evidence really is insufficient to support a charge under section 211 that argument could be addressed to the Subdivisional Magistrate as a ground for dicharge under section 253 (2), Code of Criminal Procedure, and I see no reason why the decision on that point should be taken out of the hands of the Magistrate.

I do not think any sufficient grounds have been made out for interfering with the ordinary course of a trial which has been legally commenced.

The application is dismissed.

*I. L. R. 26 Cal., page 786 (1899).

Criminal Procedure—408—562.

Criminal Revision No. 994 of 1903.

March 2nd, 1904.

Before A. M. B. Irwin, Esq.

MI SHWE NYUN *v.* KING-EMPEROR.

Mr. *H. G. S. Pillay*—for applicant. | Mr. *H. M. Lütter*—for the Crown.

An appeal lies to the Court of Session against a conviction without sentence by a 1st class Magistrate under section 562, Code of Criminal Procedure.

Mi Shwe Nyun applies for Revision of the order of the first class Subdivisional Magistrate of Katha, convicting her of cheating and requiring her to execute a bond with sureties under section 562, Code of Criminal Procedure.

The question then arises whether the order is appealable. If it is, I am precluded by section 439 (5) from entertaining the present application. The point does not appear to have been decided in any published judgment. The only light thrown on it by the Reports is that no order under section 562 seems to have been revised on application of the convict.

The question is not free from difficulty, for the Chapter on appeals (XXXI) contains no mention of section 562 or 563, but stands as it stood before there was any exception to the rule in section 258 (2) that conviction must be followed immediately by sentence. It seems, therefore, desirable to travel beyond the precise question which arises in the present case, and to examine generally the subject of appeals from convictions without sentence, and from orders under sections 562, 563 and 380, Code of Criminal Procedure.

Section 404 seems at first sight to classify appeals into appeals from judgments and appeals from orders, and sections 405 and 406 seem to provide for the latter, and sections 407, 408, 410, 411 and 417 for the former, but the word "judgment" is not used in these sections, the general rule is "any person convicted may appeal," and sections 407 and 408 contain also the variation, "any person sentenced." Section 415 mentions an appeal against a sentence. Section 417 speaks of an "order of acquittal," section 423 speaks of an "order of acquittal," a conviction and "any other order." In section 425 is the expression "finding, sentence or order appealed against." It seems then that "judgment" and "order" are not necessarily contrasted terms, and an order contained in a judgment may be spoken of as an order appealed against.

The general rule then is: "Any person convicted may appeal" (sections 407, 408, 410, 411) within so many days from "the date of the sentence or order appealed against" (Articles 150, 154, 155, Schedule II, Limitation Act). When a conviction is followed immediately by sentence the appeal ordinarily lies against both. When there is

MI SHWE NYUN v. KING-EMPEROR. 1904.

no sentence time cannot run from the date of sentence, it must be from the date of the "order," and as an order "of acquittal" is spoken of in section 417, "order" in the Limitation Act may be held to cover a conviction. But if such an appeal against conviction without sentence is admitted and is insuccessful, and if a sentence under section 563 follows, will another appeal lie against the sentence? If so, it would apparently be against the sentence only, as the appeal against the conviction has been decided. Again, if no appeal be preferred against the conviction, will an appeal against the sentence under section 563 include the conviction? Will time be held then to run separately in respect of the conviction and in respect of the sentence? These are questions which it is not easy to answer with confidence in the present state of the Code. But still greater difficulties arise on consideration of section 380. This, with the proviso to section 562, closely resembles section 349, and it is not apparent why it is placed in Chapter XXVII, as there is no sentence to confirm. But while section 408 provides for an appeal by a person sentenced under section 349, there is no such special provision for appeals from orders passed under section 380. It is clearly open to a Magistrate acting under section 380 to accept the conviction and pass sentence at once and the sentence may extend to two years' imprisonment; therefore it cannot be inferred from the absence of any special reference to section 380 that the peculiar procedure laid down in that section restricts in any way the general rule "Any person convicted may appeal." If there is no restriction in the case of a person sentenced at once, what is there to indicate any restriction in the case of a person released on security?

But if a person sentenced under section 380 has a right of appeal, to what Court does the appeal lie? It can hardly be said that the trial was held by a Magistrate of the first class, and if it were so said, the reference to section 349 in section 408 would be superfluous. It would seem therefore that the appeal lies to the District Magistrate under section 407, and this is certainly an anomalous result, and not in keeping with the provisions of section 408 relating to section 349.

From these considerations it is apparent that a clear and consistent scheme of appeals in cases under sections 562, 380 and 563 cannot readily be evolved from the rules in Chapter XXXI, which were framed before those sections were enacted. The only practicable course seems to be to abandon the attempt to evolve any such complete scheme, and decide the particular question now arising without much regard to the difficulties which surround the other parts of the subject.

The only sections I can find which restrict the general rule "any person convicted may appeal," are sections 412, 413 and 414. In the present case the accused was tried regularly and not plead guilty: therefore sections 414 and 412 do not apply. Section 413 prohibits appeal in cases in which certain light sentences are passed. It is silent about cases in which no sentence is passed. It would be contrary to accepted principles of interpretation to hold that a small sentence is to include no sentence, when such a construction would take away the right of appeal. It may also be noted that an order under

section 562 includes security for good behaviour, and to take away the right of appeal against such an order would be to some extent incongruous with section 406. I hold that the applicant has a right of appeal to the Court of Session under section 408. I therefore dismiss the application for revision.

MAUNG WAING v. MA CHIT. 1904.

Clause (9) of section 488 is new. Shortly before it was enacted a bench of the Calcutta High Court remarked in *Benbow* v. *Benbow* * "the complaint should be inquired into by the Court within the local limits of whose jurisdiction the husband neglected to maintain his wife." Clause (9) seems to be designed exactly to carry out this principle The question then arises, "Did the applicant neglect to maintain respondent in Mandalay District"? The fact of occasional visits and cohabitation in Mandalay does not seem to affect this question. Ordinarily a wife should live with her husband, and it seems to me to be straining the term "resided" unduly to make it cover occasional visits. Webster's Dictionary and the Century Dictionary are both against any such construction of the word. I am forced to differ from my learned predecessor, and to hold that mere occasional visits and cohabitation do no constitute the residents within the meaning of section 488 (9).

But the objection to jurisdiction was not taken in the Court below and I think the defect is cured by section 531, Code of Criminal Procedure, which seems to be expressly designed to cover cases like the present, in which the Magistrate had power to try cases of this nature and the only defect in his jurisdiction was of one locality. It is not alleged that any failure of justice has resulted from the error.

The objection that marriage is not proved was not seriously pressed. Applicant told respondent he had no other wife. She went to live with him at Myittha, and it was not until after some months of cohabitation that she discovered that he had an elder wife in Mandalay. I see no reason to interfere with the finding on this point. Then it is said that respondent has no just ground for refusing to live with applicant. Applicant when examined said "I called her to come and live with me at Myittha but she refused to come. If she came and stayed with me at Myittha I would feed her." To this respondent replies that she dare not go to Myittha as the elder wife would beat her. She has alleged that the elder wife came to beat her both at Myittha and at Mandalay, but it does not appear that she ever really did beat her.

The Magistrate says that the Myook (applicant) tried to injure Ma Chit by inciting a third party to falsely charge her father and brother with criminal breach of trust in respect of a cart and bullocks which he (Maung Waing) had given to Ma Chit and that the head wife assaulted Ma Chit at Myittha. He thinks that after such treatment she should not go back to Myittha to get a repetition of the treatment, and remarks that it is not owing to her own act, but to that of the husband, that she has to stay with her parents in Mandalay. I think the Magistrate is mistaken in saying that the head wife assaulted Ma Chit. Ma Chit's own statement is merely that the head wife quarrelled with her and she had to run away. Maung Waing has behaved very badly, but I do not think Ma Chit has shown sufficient cause for refusing to return to Myittha. In *Ma The* v. *Maung Tha E*,†

* I. L. R., 24 Cal., p. 638 (1897).

† 1, U. B. R., 1897—1901, p. 104 (1897).

Mr. Burgess remarked that no authority was shown for holding that any other reason than habitual cruelty or adultery can be treated as sufficient reason under section 488. I am not prepared to dissent from this, and respondent has not shown habitual cruelty on the part of Maung Waing. The utmost that can be said is that she has some reason to fear that he would not protect her from annoyance to which the head wife is likely to subject her.

I therefore set aside the Magistrate's order, but without costs.

Criminal Procedure—514.

Before A. M. B. Irwin, Esq.

KING-EMPEROR *v.* NGA THEIN GA.

Criminal Revision No. 221 of 1904. March 22nd.

Held,—that when a bond for good behaviour is broken and the punishment for such breach is completely suffered before the period named in the bond expires, the sureties, when paying the forfeiture should be asked whether they agree to the bond continuing in force. If they do not agree, the Magistrate should proceed under section 126 (3), Code of Criminal Procedure.

Reference :—

4, C. W. N., page 121 (1899).

The Subdivisional Magistrate of Pyinmana, on 30th July 1903, in Criminal Miscellaneous case No. 53 of 1903, ordered Nga Thein Ga to execute a bond, with sureties, for his good behaviour for one year. The bond was signed on 3rd August.

On 8th August 1903, Nga Thein Ga was arrested at Toungoo, and on the 21st of the same month, convicted of theft and sentenced to whipping. The Pyinmana Police thereupon applied to the Subdivisional Magistrate, Pyinmana, to recover the penalty specified in the bond, under section 514, Code of Criminal Procedure. The Magistrate took some evidence of the conviction, and then called in the sureties to produce Nga Thein Ga. He had no authority to do this. The sureties never bound themselves to produce him and no such order is provided for by section 514. The sureties said Thein Ga had gone to Tenasserim. They were allowed time, and eventually he was found and summoned to show cause why the bond should not be forfeited. He disobeyed the summons and was arrested. He and the sureties were called on to show cause. The conviction was proved. The sureties were ordered to pay the penalty named in the bond, and the Magistrate's order about Thein Ga was that he "must go to jail for the balance of the year there is to run."

The District Magistrate has submitted the proceedings to this Court, saying that the Subdivisional Magistrate has fixed the term of imprisonment as six months from his order which was 18th February 1904 instead of one year from 30th July 1903. I cannot find any basis for this statement. On the record of the proceedings under section 514 (Criminal Miscellaneous No. 72 of 1903) the only order relating to the imprisonment is the one I have quoted above. On the original record (53 of 1903) there is a duplicate of a warrant of imprisonment for one year. It is dated 31st July 1903, but the jailor's endorsement is dated the 20th February 1904, so I think it may be taken that this is the warrant issued in pursuance of the order of 18th February 1904. Whether it was strictly correct to ante-date it may be doubted, but it clearly authorized detention for the correct period, ending on 30th July 1904.

MA HNIT v. MAUNG PE TO. 1904.

and *Teacotta Shekdar* v. *Ameer Majee* * respectively, and by the Judicial Commissioner of Lower Burma in *Tay Ya* v. *Maung Ba Hlaing*.† The Bombay Court went so far as to say that the order was illegal because made *ex-propria motu* and without notice I cannot agree in that, as it seems to be reading into the Code what does not exist in it. I hold that an *ex-parte* order under section 528 is not illegal because made *ex-parte*, but that ordinarily an order under clause (1) of that section ought not to be made on application of either party without giving the opposite party, whether he be complainant or accused, an opportunity of showing cause against it. I decline to reverse the order on the ground that no such opportunity was given. Cause can be shown in this Court.

* * * * *

* I. L. R., 8 Cal., page 293 (1882).

† L. B. P. J., page 392 (1897).

Criminal Procedure—562.

Criminal Revision No. 959 of 1903. January 16th, 1904.

Before A. M. B. Irwin, Esq.

KING-EMPEROR *v.* { NAWTARA SINGH. NGA AUNG THA. KYAWA SINGH. NARAIN SINGH.

In order to enable a Court to exercise the power conferred by section 562 of the Code of Criminal Procedure, it is not necessary that the offender should be young, that the offence should be trivial, and that there should be extenuating circumstances. The mention of these conditions and of the character and antecedents of the offender merely indicates generally, considerations with regard to which the discretion of the Court should be exercised in dealing with first offenders who are convicted of any of the offences specified in the section.

References :—

(1) U. B. R., 1897—1901, page 137.

——————129.

(2) L. B. R., pag 65 (1903).

See Penal Code, page 7.

Criminal Procedure—403-437.

Before G. W. Shaw, Esq.

Criminal Revision No. 346 of 1904. June 28th.

MI THE KIN *v.* NGA E THA.

Mr. H. M. Lütter, Government Prosecutor, for the Crown.

Dismissal of complaint or discharge of accused—Power of Magistrate to reopen case after—

Held,—The discharge of an accused person or the dismissal of a complaint is no bar to the institution of fresh proceedings otherwise than under section 437, Criminal Procedure Code. But a Magistrate entertaining a complaint in such circumstances is bound to exercise a proper discretion.

References:—

I. L. R., 28, Calc., page 6-2.
——— 29, Calc., page 726.
L. B. P. J., 1893-1900, page 169.
L. B. R., 1903, Vol., II, page 27.
U. B. R., 1892-1896, Vol. I, page 48.

Mi The Kin made a complaint to the Subdivisional Magistrate charging Nga E Tha with an offence under section 451, Indian Penal Code. In the second paragraph of the complaint, she said that the Headquarters Magistrate, on a previous complaint, and after examining witnesses, had discharged the accused. The Subdivisional Magistrate thereupon rejected the complaint made to him saying "No fresh complaint can be entertained. The proper course for complainant is to ask the superior Court for further enquiry under section 437, Criminal Procedure Code."

Mi The Kin then went to the Sessions Court praying that the Subdivisional Magistrate's order might be set aside in view of the ruling of the Chief Court, Lower Burma, in *King-Emperor* v. *Nga Pyu Di and two others*. *

The Sessions Court rightly held that the Subdivisional Magistrate was bound to follow the ruling of this Court in *Queen-Empress* v. *Po Nyein*, † but having regard to the conflict of opinion between the two High Courts, submitted the case under section 438 for a fresh decision on the point in question. The Government Prosecutor has been heard, and the principal cases discussed in the Chief Court Ruling have been referred to.

My learned predecessor does not appear to have had the advantage of hearing arguments before coming to the conclusion he did in *Queen-Empress* v. *Po Nyein*. There were in fact at that date already numerous decisions of the Indian Courts. They were of a conflicting character, but the weight of opinion was even then in favour

* L. B. R., 1903, Volume II, page 27.
† U. B. R., 92-96, Volume I, page 48.

MI THE KIN v. NGA E THA.

of the view that a Magistrate is competent to entertain a fresh complaint, after an order of dismissal or discharge without an order for further enquiry under section 437.

The Judicial Commissioner of Lower Burma very soon afterwards in the case of *Queen-Empress* v. *Nga O Bok* * decided in this sense, dissenting from the view taken in *Queen-Empress* v. *Po Nyein*. The Full Bench of the Calcutta High Court also in *Dwarka Nath Mondul* v. *Beni Madhab Banerjee* † and *Mir Ahwad Hossein* v. *Mahomed Askari* ‡, more recently held that a Magistrate is competent to take further proceedings after an order of discharge in a warrant case without an order for further enquiry under section 437. Finally the Chief Court, Lower Burma, in the case already cited has in a full Bench decision taken the same view.

The principal point for consideration have been very clearly brought out in these later rulings, *viz.*, that there is nothing in the Code of Criminal Procedure with prevents a Magistrate from exercising the jurisdiction conferred upon him by section 190 (*1*) (*a*) by receiving a complaint in a case where a previous complaint has been dismissed, or the accused person has been discharged. The explanation to section 403, Criminal Procedure Code, expressly declares that the dismissal of a complaint or the discharge of the accused is not an acquittal for the purposes of this section. I think there can be no doubt that to hold an order of dismissal or discharge a bar to subsequent proceedings unless an order has been passed under section 437, is inconsistent with the provisions of section 403. It has been rightly pointed out that in order to initiate further proceedings it is not necessary that the previous order of dismissal or discharge should be set aside, and that the Code does not provide for such an order being set aside. The difference between such an order and an order of acquittal is that the former may remain in force without being a bar to further proceedings. The decision in *Queen-Empress* v. *Po Nyein* implied that an order under section 437, was necessary in all cases, but I think the Calcutta and Rangoon High Courts are right in holding that section 437 is merely an enabling section, that is, a section which enables the superior Courts to act where further proceedings have not been initiated otherwise. I hold then in supersession of the ruling in *Queen-Empress* v. *Po Nyein* that a Magistrate is not debarred by a previous order of dismissal or discharge from entertaining a complaint without an order for further enquiry under section 437, Criminal Procedure Code.

But it is necessary to point out that in dealing with a complaint in such circumstances a Magistrate is bound to proceed in the manner laid down in sections 200 *seqq.*, that is after examining the complainant, and if necessary, after a preliminary enquiry or local investigation, to decide whether there is sufficient ground for proceeding. In coming to this decision he is bound to exercise a proper discretion,

* L. B. P. J. 1893-1900, page 169.
† I. L. R. 28 Cal. page 652.
‡ —— 29 Cal. page 726.

and a discretion improperly exercised would be a ground for interference by a Court of Revision. On the point of discretion the following remarks may be quoted.

Chief Justice Maclean in *Queen-Empress* v. *Dolegobind Dass** says:—

"No Presidency Magistrate ought in my opinion to rehear a case previously dealt with by a Magistrate of co-ordinate jurisdiction upon the same evidence only, unless he is plainly satisfied that there has been some manifest error or manifest miscarriage of justice."

Mr. Justice Prinsep in *Dwarka Nath Mondul* v. *Beni Madhab Banerjee* † says:—

"If a reasonable discretion is not exercised injustice may be done. That is a matter which may be set right by a superior Court."

It is the duty of a Magistrate therefore who receives a complaint in a case where there has been a previous order of dismissal or discharge, not to issue process, unless he is plainly satisfied that there has been some manifest error or manifest miscarriage of justice, or unless new facts are adduced which the complainant had not knowledge of, or could not with reasonable diligence have brought forward in the previous proceedings.

* I. L. R. 28 Cal., page 211.
† I. L. R. 28 Cal., page 652.

Criminal Procedure—488.

Before H. Adamson, Esq., C.S.I.

MA TIN *v.* MAUNG AN GYI.

Criminal Revision No. 268 of 1904. May 26th.

Mr. A. C. Mukerjee—for applicant. | *Mr. S. Mukerjee*—for respondent.

After an order of maintenance has been made for a wife and child, the wife returns with the child, and lives with the husband who maintains them in his own house. The effect is to put an end to the previous proceedings under section 488, and to render the order of maintenance ineffectual and incapable of being enforced.

Reference:—

Allahabad Weekly Notes, 1888, page 217.

Applicant and respondent are wife and husband. In 1901 the applicant obtained an order against the respondent under section 488, Criminal Procedure Code, for Rs. 7 per month as maintenance for herself and her child. Thereafter the parties lived together and respondent maintained his wife and child in his own house for three years. In 1904 the parties quarrelled and separated again. Thereupon applicant applied under section 490 for enforcement of the order of 1901, and the Magistrate levied maintenance at Rs. 7 for one month from the respondent. The respondent then made the application which is the subject of this revision. It is an application under section 489, Criminal Procedure Code, to alter the order of maintenance passed in 1901, on the ground that the applicant left him without cause, and that he should now be held responsible only for the maintenance of the child and not for the maintenance of his wife. The Magistrate inquired into the case and found that the applicant had left her husband without sufficient cause, and held that the fact that the parties had lived together after the order of 1901 had the effect of putting an end to the previous proceedings and of bringing about a state of affairs from which a fresh starting point must be made with regard to maintenance, and ordered respondent to pay maintenance at the rate of Rs. 3 per month for the child alone and not for the wife.

Applicant has come up in revision against this order on the ground that the magistrate acted without jurisdiction in modifying the order of his predecessor passed in 1901.

The question that arises is whether the effect of parties living together again is to put an end to previous proceedings for maintenance. The only authority that I can find is *Phûl Kari* v. *Harnam* * in which it was held that when a woman who had an order of maintenance against her husband returned voluntarily to live with her husband, the order of maintenance became ineffectual as to the future and was incapable of being enforced. This ruling has reference only to maintenance of a wife and not to the maintenance of a child, but I think that

* Allahabad Weekly Notes, 1888, page 217.

45

MA TIN v. MAUNG AN GYI.

the principle applies to both cases. The basis of the order is the neglect or refusal of the husband to maintain his wife or his child. When the parties come together and live together again, the former act of neglect or refusal has ceased to exist, and if a new act of the kind subsequently arises, new evidence is required to prove it, and fresh proceedings must be taken. I think therefore that the Magistrate was right in holding that the fact that the parties subsequently lived together for three years, had the effect of putting an end to the proceedings of 1901.

The proper course for the Magistrate to adopt would have been to simply hold that the order of 1901 has ceased to have effect, and to leave it to the applicant to make a fresh application. But the respondent did not object to pay maintenance for the child, and the question of his liability to pay for the maintenance of his wife has been fully threshed out on both sides, and decided on the evidence. Though the procedure is irregular, substantial justice has been done, and there is no ground for interfering in revision.

The application is dismissed.

Criminal Procedure 190 (1) (b).
Police Report.

Before G. W. Shaw, Esq., I.C.S.

KING-EMPEROR *v.* NGA THAUNG.

Criminal Revision No. 527 of 1904. July 19th.

Mr. A. C. Mukerjee for accused.

"Police Report" in section 190 (1) (*b*) includes all kinds of police reports, and not only reports under Chapter XIV or reports in cognizable cases.

References:—

(1) 10 Bom. H. C. R., Criminal Cases, page 70.
(2) L. B. R., 1903, Vol. II, page 146.
(3) U. B. R., 1892—96, Vol. I, page 28.
(4) U. B. R., 1892—96, Vol. I, page 328.
(5) U. B. R., 1897—1901, Vol. I, page 54.

In obedience to the orders of the Head Constable in charge of his Police Station, Police Constable Nga Nyun went to the St. John's Leper Asylum in order to arrest one Po Saw who was charged with an offence under section 366, Indian Penal Code, or section 376, Indian Penal Code, and had once escaped from custody. He took respondent Nga Thaung, another constable, and Po Maung a block elder, with him, and after obtaining the permission of the Superintendent of the Asylum arrested Po Saw, who was found hiding under a bed in one of the wards, and proceeded to take him to the Police Station. They had not gone far when Po Saw began to make objection, and when Nga Nyun said he must come, and laid hold of his arm, he struck Nga Nyun a violent blow in the eye and ran off. Respondent Nga Thaung who was close to Po Saw did nothing to prevent his escape. For this omission he was sent for trial under section 29, Police Act, and fined Rs. 25.

The District Magistrate has referred the case for the orders of this Court on several grounds. First the District Superintendent of Police applied for the District Magistrate's sanction, and in the District Magistrate's absence sanction was given by the Headquarters Assistant Commissioner, Mr. Scott "for the District Magistrate." Then the same officer (Mr. Scott) in his capacity of Magistrate entertained the case and tried and convicted the respondent as above noted.

The District Magistrate is of opinion that no sanction was necessary, that if it was, Mr. Scott had no jurisdiction to give it, that Mr. Scott could only have taken cognizance of the case under section 190 (1) (*c*), Criminal Procedure Code, because the Police Report on which he did take cognizance was not a police report within the meaning of section 190 (1) (*b*), and that he did not comply with section 191,

47

KING-EMPEROR v. NGA THAUNG.

Criminal Procedure Code; finally that the punishment awarded was inadequate and that respondent ought to have been tried under section 223, Indian Penal Code.

I concur with the District Magistrate in regard to the sanction. No sanction was necessary here because the proceedings were initiated by the District Superintendent of Police. Judicial Department Circular No. 22 of 1892 deals with prosecutions otherwise initiated, and if a sanction had been necessary Mr. Scott was not competent to grant it "for the District Magistrate."

In regard to the question whether the Police Report was a Police Report within the meaning of section 190 (*1*) (*b*), Criminal Procedure Code, the District Magistrate's view is in accord with the rulings of this Court on the point. *Queen-Empress* v. *Mi Min Mè and two others.** *Queen-Empress* v. *Nga Thaun and others*† and *Queen-Empress* v. *Jargissa*‡. But the Chief Court of Lower Burma has recently examined the question and come to a decision in which the rulings just cited were dissented from, and it seems desirable to consider afresh whether the police reports referred to in section 190 (*1*) (*b*) are, or are not, confined to Police Reports under Chapter XIV of the Criminal Procedure Code, or reports in cognizable cases. I have had the advantage of hearing the Government Prosecutor on the subject as well as the respondent's Advocate. It does not appear that the question was fully argued before my learned predecessor, and it is certain that there was a later ruling of the Bombay High Court in existence at the time the order in *Queen-Empress* v. *Mi Min Mè, and others* was passed which he does not mention. I refer to *Reg.* v. *Lala Shambu*§ which declared the previous ruling to be inoperative in view of the provisions of the new Code of 1872. It is instructive to consider the changes introduced by the Codes of 1872 and 1882. The former specially provided for Police Reports in non-cognizable cases, which were to be treated as complaints. In the Code of 1882, it was expressly declared in section 4 (*a*) that the report of a Police Officer was not a complaint, and the special provision of the Code of 1872 relating to Police Reports in non-cognizable cases, was omitted. I am of opinion that the result of these changes was to make section 191 (*b*) of the Code of 1882 corresponding to section 190(*1*) (*b*) of the present Code applicable to all kinds of Police Reports. This is the view which has been taken by the Full bench of the Lower Burma Chief Court in the case already referred to, *King-Emperor* v. *Po Thin and others.*‖ In that case all existing rulings were examined and several previous Lower Burma decisions were dissented from, as well as those of this Court. *Queen-Empress* v. *Jargissa* merely followed the two earlier rulings. In those, the changes introduced by the Codes of 1872 and 1882 were not mentioned, and apparently their effect escaped notice.

* U. B. R., 1892—96, Vol. I, page 28.
† U. B. R., 1892—96, Vol. I, page 328.
‡ U. B. R., 1897—01, Vol. I, page 54.
§ 10, Bom., H. C. R., Criminal Case, page 70.
‖ L. B. R., 1903, Vol. II, page 146.

I therefore hold, in supersession of the previous decisions of this Court on the point, that section 190 (*1*) (*b*), Criminal Procedure Code, includes all kinds of Police Reports and not only Reports under Chapter XIV, or reports in cognizable cases. It follows that in the present case, there was no illegality involved in Mr. Scott's trial of the case without the application of section 191, Criminal Procedure Code. It remains to consider whether the sentence should be enhanced, and whether a retrial should be ordered. It is apparent on a perusal of the evidence that the question arose whether an offence under section 223 (or 225A), Indian Penal Code, had been committed, and in accordance with the ordinary rule, the respondents should have been prosecuted for the more serious offence. Section 29 of the Police Act is intended to provide for cases of misconduct which do not fall under some section of the Indian Penal Code, or other law.

The respondent has had an opportunity of showing cause, and he has done so through an Advocate. But no good reason has been advanced against a retrial.

For these reasons I set aside the conviction and sentence and direct a retrial under section 223 or 225A, Indian Penal Code.

Criminal Procedure—109, 110, 112.

Criminal Revision No. 1096 of 1904. January 31st, 1905.

Before A. M. B. Irwin, Esq., C.S.I.

KING-EMPEROR *v.* NGA PO THAUNG.

A Magistrate acting under section 109 or 110, Code of Criminal Procedure need not confine himself to the information contained in the Police papers. He can, if he thinks fit, take information on oath in the presence of the accused before framing the order under section 112, Code of Criminal Procedure.

Reference :—

2 L. B. R. 40 (1903), followed.

I am not inclined to agree with the learned Sessions Judge that the procedure was incorrect because no order was framed under section 112.

Chapter VIII is in some respects difficult to interpret exactly, as it is framed mainly for dealing with cases in which the accused is brought up on warrant or summons, while the great majority of cases in this Province are instituted by the Police after arrest under section 55.

The reference to "further evidence" in section 117 seems to indicate that some evidence may be taken before the order under section 112 is framed. Moreover both section 109 and section 110 show that the Magistrate's action must be based on information received, and there is no reason why the Magistrate should confine himself to the information contained in the Police papers. He can, if he thinks fit, take information on oath in the presence of the accused before deciding whether he will take action under section 109 or 110.

And in my opinion it is often desirable that the Magistrate should do so. The Police do not always distinguish between section 109 and section 110. In this very case the final report is that accused has no sufficient means of livelihood and is an habitual thief, and section 110 is quoted. From this report the Magistrate could not decide whether to proceed under section 109 or section 110; after framing an order under the one section he might find that the evidence referred mainly to the other section. The issues would thus become confused, and the accused would be prejudiced in his defence. See also my remarks in *King-Emperor* v. *Nga Po Saung.**

The second sub-section of section 117 also prescribes that the inquiry shall be made as nearly as may be practicable in the manner prescribed for conducting trials and recording evidence in warrant cases. The order under section 112 corresponds to the charge in a warrant case. In my opinion the Magistrate would generally exercise a wise discretion by taking some information on oath before framing the order under section 112, just as some or all of the evidence for the prosecution in a warrant case is taken before framing a charge under section 254. I can see nothing in Chapter VIII to preclude the Magis-

* 2 L. B. R., 40 (1903).

KING-EMPEROR v. NGA PO THAUNG.

trate from doing this. It is certainly the fairest course to the accused. Under the terms of section 117 (2), section 256 applies to the case, and the accused has a right to recall the crown witnesses after he is called on for his defence.

In the present case the Magistrate, after taking all the evidence for the prosecution, discharged the accused. I think his procedure was perfectly correct.

Criminal Procedure—109, 110, 514.

Before A. M. B. Irwin, Esq., C.S.I.

KING-EMPEROR *v.* NGA AND 2 OTHERS.

Criminal Revision No. 116 of 1904. March 22nd 1905.

When a bond for good behaviour is broken, the principal and sureties are jointly and severally liable for the sum named in the bond and no more.

Reference—

U. B. R., 1904, Criminal Procedure, 13.

Hardi Khan gave a bond for Rs. 100, with two sureties, for his good behaviour for one year. He committed an offence punishable with imprisonment, and the Magistrate required him to pay Rs. 100, and his sureties also Rs. 100. It is possible that the Magistrate may have been led to do this by misreading my order in *King-Emperor* v. *Nya Thein Ga*,* in which I said "the Magistrate ought to have ordered the principal and the sureties (not the sureties only) to pay the penalty named in the bond." But this does not mean that the penalty should be paid twice over, or that the sureties are liable to a different penalty from the principal. A surety is a person who undertakes jointly with his principal that the terms of the bond shall be duly fulfilled, and notwithstanding the peculiar manner in which the forms of bonds are framed in the schedule to the Code, I think the language of sections 109 and 110 leaves no doubt that the sureties to be required under those sections are sureties in the ordinary sense of the term. They undertake that their principal will be of good behaviour and in case of a breach the principal and sureties are jointly and severally liable for the sum named in the bond and no more. I therefore direct that the Rs. 100 paid by the sureties be refunded to them.

The bond ought to have been transferred to the record of the proceedings under section 514.

The Magistrate's note that the sureties declined to stand security any longer, and his order committing Harid Khan to jail, ought to be on the record of the original case under section 109. The fresh warrant of imprisonment and the new bond subsequently executed are on that record, but there is nothing in the diary to show how they came to be drawn up.

* U. B. R., 1904, Cr. Pro., 13.

Criminal Procedure—254, 346, 349 530 (1).

Before A. M. B. Irwin, Esq., C.S.I.

KING-EMPEROR *v.* NGA PO SI.

Criminal Revision No. 51 of 1905, January 26th.

It is not irregular for a Magistrate of the second or third class to frame a charge although he thinks that he cannot inflict adequate punishment and intends to submit the proceedings to the District or Subdivisional Magistrate to pass sentence.

When a case is submitted to a Magistrate under section 349, Code of Criminal Procedure, he may not transfer it to another Magistrate for disposal.

Reference:—

2 L. B. R., 285 (1904).

* * * *

I must also dissent from the proposition that the Magistrate should have stayed proceedings before framing a charge. Section 254 must be read with sections 346 to 349, and I fully concur with the ruling of a full Bench of the Lower Burma Chief Court in *King-Emperor* v. *Hla Gyi* * that it is not irregular for a Magistrate of the second or third class to frame a charge against an accused person, in a case which he has jurisdiction to try, even though at the time of framing the charge he intends, if he is of opinion that the accused is guilty, to submit the proceedings to the District or Subdivisional Magistrate to pass sentence.

The accused pleaded guilty and the third class Magistrate submitted the proceedings to the Subdivisional Magistrate as he was of opinion that a sentence of whipping would be suitable. The Subdivisional Magistrate recorded that he was too ill with fever to go to office, and asked the Headquarters Magistrate to decide the case. The Headquarters Magistrate, who is a Magistrate of the second class, did so and passed a sentence of whipping. It is quite clear that he had no jurisdiction to dispose of the case, and his proceedings are void, under section 530 (*l*) Code of Criminal Procedure. The sentence having been executed, the illegality cannot be remedied.

* 2 L. B. R., 285 (1904).

Criminal Procedure—369, 439.

Criminal Revision No. 931 of 1904. January 4th 1905.

Before A. M. B. Irwin, Esq., C.S.I.

AH LÔK *v.* KING-EMPEROR.

Messrs. Swinhoe and Broadbent—for Applicant.

When the Hight Court has passed an order in revision under section 439, Code of Criminal Procedure, it cannot review its own order.

References :—

I. L. R., 7 All., 672.
———., 10 Bom., 176.
———., 14 Cal., 42.
L. B. S. J., 146.
L. B. P. J., 365.

The applicant Ah Lôk and another were, on 8th October 1904, convicted at a summary trial by the Subdivisional Magistrate of Homalin of illegally selling foreign spirit, and Ah Lôk was sentenced to pay a fine of Rs. 100, and other spirit found in his possession was confiscated.

On 15th October, the District Magistrate submitted the record to the Judicial Commissioner, with a recommendation that the sentence be reduced and the order of confiscation cancelled.

On 27th October 1904, my learned predecessor reduced the fine to Rs. 20 and set aside the orders confiscating the liquor and empty bottles found in the house and granting rewards out of the fines, "for the reasons stated in the order of reference".

On 8th November, Ah Lôk's Advocate presected the present petition, asking that the conviction and sentence be set aside on the ground that all the witnesses for the prosecution were abettors of the offence and there was no independent evidence. When this petition was presented the applicant was not aware that the case had already been dealt with in revision by this court on a reference by the District Magistrate. The first question which now arises is, whether the existence of the order of this Court of 27th October is a bar to any further revision. It is not denied that the order now subsisting in the case is an order of this Court, and that if any further orders are to be passed they must be by way of review of the order of 27th October.

The applicant's main contention is that if a review be not allowed he will be deprived of a relief which he would probably have obtained if the District Magistrate had not intervened on his behalf. It is said that Mr. Shaw dealt only with the points referred by the District Magistrate, that the most important points were not laid before him at all, that it was not necessary for him to read the notes of evidence, and that he most probably did not do so.

Mr. Broadbent admits that he can find no precedent directly in his favour. I am indebted to him for drawing my attention to some rulings

AH LÔK
v.
KING-EMPEROR.

which bear on the point in question and are rather against him, though he considers that the cases can be distinguished from the present one.

In *Queen-Empress* v. *Durga Charan* * the High Court of Allahabad held that it had no power to review an order of a single Judge of that Court, rejecting an application for revision of a conviction and sentence of a Pleader for cheating, which had been confirmed on appeal by the Court of Session, although a full bench of the same Court had subsequently decided that the Pleader should not have been suspended

In *Queen-Empress* v. *C. P. Fox* † the High Court of Bombay had of its own motion called for the record and enhanced the sentence, and a full bench subsequently held that the Court had no power to review that order, even on the ground that the conviction was totally illegal and that the facts found did not constitute an offence.

In the case of *F. W. Gibbons* ‡, the High Court of Calcutta (full bench) held that it could not revise an order of a division bench of that Court, convicting a person under section 307 of the Code of Criminal Procedure.

The last case has only a very general bearing on the present one, but the lucid exposition by the learned Chief Justice of the meanings of sections 369 and 439 is much to the point. The Allahabad case is to my mind strongly against the present applicant as the full bench had substantially found that an innocent man had been convicted. *Fox's* case is almost on all fours with the present one. Part of the argument which did not prevail in that case was "In the great mass of cases the High Court decides upon limited points on an inspection of the papers only. There is generally no appearance of the parties either in person or by Pleader; and is it to be supposed that if the Court overlooks a fact—and it does not pretend to go through all the papers—and decides wrongly, that it is debarred from revising its decision?" It is true that in the case then under consideration notice had been served on the accused to show cause against enhancement, but he did not appear. The decision, however, proceeded on broad grounds, and the fact that the accused had had notice was not referred to.

It is plainly the general rule that a Court cannot review its own decisions, and a review cannot be permitted unless clear authority of law is shown for it. In the present case no such authority is shown, and the reported decisions, such as they are, are against review. I hold that I have no jurisdiction to grant the prayer of the present application.

That being so, I have nothing to say on the merits, except that the rulings of the Judicial Commissioner of Lower Burma which the learned Counsel relied on, *viz.*, *Mi The U* v. *Queen-Empress* § was overruled by the Special Court in *Queen-Empress* v. *Bastin.* ‖

The application is dismissed.

* I. L. R., 7 All., 672.
† I. L. R. 10 Bom., 176.
‡ I. L. R., 14 Cal., 42.
§ L. B. S. J., 146.
‖ L. B. P. J., 365.

58

Criminal Procedure—556.

Before A. M. B. Irwin, Esq., C.S.I.

KING-EMPEROR *v.* NATARAJ AYER.

Criminal Revision No. 1080 of 1904. January 29th, 1905.

The proviso to section 43, Stamp Act, does not justify a Magistrate in acquitting of an offence under section 62 for the reason that there was not intent to evade the law, but it may be a good ground for passing a merely nominal sentence.

A Magistrate who is disqualified by section 556, Code of Criminal Procedure, from trying a case is equally debarred from interfering in revision to the prejudice of the accused under section XII of the Schedule to the Upper Burma Criminal Justice Regulation.

References:—

I. L. R., 23, Cal., 44 (1895), followed.
U. B. R., 1897-1901, 133, followed.

The Collector sanctioned the prosecution of Nataraj Ayer, Ma Yon and Ma Chon under section 62 of the Stamp Act, after deficient duty and penalty had been levied by a Civil Court. Then as District Magistrate he took cognizance of the offence under section (19) (*1*) (*c*), Code of Criminal Procedure, and transferred the case for trial to the Subdivisional Magistrate.

The three accused all pleaded guilty to signing a document which was not duly stamped. The material part of the Magistrate's judgment is this, "having regard to the direction 14 on the Stamp Act I do not think any penalty is necessary, as I do not believe that the object was evasion of duty. The amount saved was only seven annas, and a penalty of Rs. 5 has already been imposed by the Lower Court. I find the accused not liable to another punishment and I discharge them."

The District Magistrate then called for the case under section XII of the Schedule to the Upper Burma Criminal Justice Regulation and after calling on the accused to show cause he convicted the two women of signing the document, and Nataraj Ayer of instigating them to sign it. He fined the last named Rs. 3, and each of the women Re. 1-8-0. He recorded "in imposing this small penalty I take into consideration that there does not appear that the women acted otherwise than in ignorance."

I am not directly concerned with the propriety of the Collector's proceedings, but I think it right to remark that some excuse for two mistakes into which the second class Magistrate fell is to be found in the Collector's order sanctioning the prosecution. Section 109 of the Penal Code is not mentioned in that order at all, nor is the offence specified for which any of the accused was to be tried.

Secondly the Collector does not seem to have considered the proviso to section 43 of the Stamp Act, and the passage in the District Magistrate's order in revision, which I have quoted above, seems to indicate that if he had considered it he would not have sanctioned or ordered any prosecution. It seems to have been the Collector's omission to

KING-EMPEROR v. NATARAJ AYER.

consider the question of intention to evade the law which caused the Magistrate to consider it and to discharge the accused.

I say this was some excuse for the Magistrate, but it was not a complete excuse, and it did not justify him in discharging the accused for two reasons. In a summons case the accused must be either convicted or acquitted, and the accused having pleaded guilty to an offence in which intent is not an ingredient the Magistrate was bound to convict. In consideration of the absence of intent to evade the law, he might have inflicted a merely nominal penalty.

The District Magistrate, having as Collector, directed the prosecution of the accused, was not competent to try them. This is clearly the meaning of the illustration to section 556, Code of Criminal Procedure, as was said by Mr. Thirkell White in *Ram Rich Pal* v. *Queen-Empress*.* I can see no distinction in this matter between an Excise case and a Stamp case. The District Magistrate himself seems to have recognized the fact when he transferred the case to the Subdivisional Magistrate. If he was disqualified from trying the case he was equally disqualified from interfering hin revision to the prejudice of the accused. If authority be wanted for this proposition it is found in *Nistarini Debi* v. *A. C. Ghose*.† The convictions therefore are bad, and must be quashed. I direct that the fines be refunded. In view of the District Magistrate's expression of opinion that there was no intention to evade the law there is no reason to order a new trial.

* U. B. R., 1897—1901, 133.
† I. L. R., 23, Cal., 44 (1895).

60

Criminal Procedure—488.

Criminal Revision No. 60 of 1905. April 3rd.

Before A. M. B. Irwin, Esq., I.C.S.

MI GAUK *v.* NGA PO HMI.

Mr. *A. C. Mukerjee*—for Appellant. | Mr. *C. G. S. Pillay*—for Respondent.

When a child is in the custody of his mother, and the father has not, before the receipt of the summons, either asked for the custody of the child or offered to provide for him in any way, he must be held to have neglected to maintain the child; and an offer made in Court to maintain the child on condition that it lives with him will not take away the Magistrate's jurisdiction to order the father to pay for the child's maintenance.

References:—

U. B. R., 1902, Crim. Pro., 7.
Punjab Record, 1894, Crl., No. 18.
16 W. R., 62 (1872).
2 L. B. R., 46 (1903).

The parties were divorced in Tabodwè 1265 (February 1904). In November Mi Gauk applied for maintenance for her son by Po Hmi, 9 years old. Po Hmi replied that he had no means and asked that the boy be made over to him. When examined he said he wished to send the boy to an English school in Mandalay, where he has relations.

The Subdivisional Magistrate dismissed the application on the authority of a ruling which has been omitted from the published volume of rulings for 1897—1901, because it is obsolete, as stated in the prefatory note next after the title page. The Magistrate ought to keep his knowledge of law up to date by reading new rulings, and ought not to refer to the original quarterly issues of rulings after complete volumes have been published.

In *Ma Nyein Me* v. *Maung Kyaw* * it was held that a Magistrate has no authority to determine who is the lawful guardian of a child and that a woman's refusal to surrender a child is no ground for stopping an allowance previously ordered. That case is not exactly on all fours with the present case because the present is an original application, but Mr. Adamson expressly dissented from the opinion of Mr. Burgess in the case of an original application. The parties before Mr. Adamson were not represented by Advocates.

The learned Advocate for the Respondent says that under section 19 of the Guardians and Wards Act the father is the *primâ facie* guardian of his son, and that Buddhist law makes the father the natural guardian of sons. Buddhist law is not applicable to the present case, and there is nothing in it contrary to Mr. Adamson's dictum that the right to the custody of the children must be determined elsewhere than in a Magistrate's Court. I am referred by the Respondent

*U. B. R., 1902, Crim. Pro., 7.

MI GAUK
v.
NGA PO HMI.

to two rulings of Indian Courts. The first, *Pachoo Daso* v. *Sreemuttee Soodhamonnee*,* was under the Code of 1861, and is not very helpful in interpreting the Code of 1898. The other case is that of *Man Singh* v. *Mussumat Dharmon*† in which the Chief Court of the Punjab set aside an order for maintenance of two sons because the father had offered to support them if they and their mother would live with him. The learned Judges said "We do not say that there may not be circumstances which would justify a finding that the father neglects to maintain his children, notwithstanding such an offer, and an order for separate maintenance notwithstanding that the father offered to maintain them if they would live with him. For example, if it appeared that in spite of a similar offer in a similar proceeding he had neglected to do so." They laid down the law that the father is *primâ facie* the guardian of his minor children and entitled to their custody and that the mother might apply to the Civil Court under Act VIII of 1890 to give her the guardianship of her children, but that the Criminal Court is not competent to enter into an inquiry as to the fitness or unfitness of the father to act as guardian.

This judgment seems to me to be based on the same principles as Mr. Adamson's judgment in *Ma Nyein Me* v. *Maung Kyaw*, except that the Punjab Court, on consideration of the terms of section 19 (*b*), Act VIII of 1890, puts on the wife the onus of moving the Civil Court, although the children have been in her custody ever since the divorce and the father has never expressed any desire to relieve her of the custody until he was summoned to pay for their maintenance. With great respect to the learned Judges I prefer Mr. Adamson's interpretation of the meaning of "neglect" in section 488, and I think it governs an original application as well as an application by the husband to cancel a previous order for maintenance. Where the husband has not, before the receipt of the summons, either asked for the custody of the child or offered to provide for him in any way, he must, in my opinion, be held to have neglected to maintain the child, and an offer made in Court to maintain the child on condition that it lives with him will not take away the Magistrate's jurisdiction to order him to pay for the child's maintenance.

The Lower Burma Full Bench case of *Maung San Hla* v. *Ma On Bwin*‡ is not exactly similar to the present case, but it follows very much the same principles as *Ma Nyein Me* v. *Maung Kyaw*, though the decision was based partly on the ground that the children were very young.

I set aside the order dismissing the application, and direct the Magistrate to reconsider the case and to fix a reasonable rate of maintenance to be paid by the Respondent to the Applicant.

* 16 W. R., 62 (172).

† Punjab Record, 1894, Crim., No. 18.

‡ 2 L. B. R., 46 (1903).

62

Criminal Procedure—190, 251–25 530.

Criminal Revision No. 519 of 1905. October 3rd.

Before G. W. Shaw, Esq.

NGA KUN *v.* KING-EMPEROR.

Mr. *F. N. Babu*—for Applicant. | Mr. *H. M. Lu*— for Crown.

Effect of irregular proceedings by Magistrate without jurisdiction.

References:—

U. B. R., 1897–01, I, 56 (followed).

——, 1902–03, Cr. Pro., 21.

——, 1904-1905, Cr. Pro., 19.

The Police sent Nga An and (applicant) Nga Kun for trial charging the former under section 379 and the latter under section 411, Indian Penal Code, with respect to some timber.

The 3rd class Magistrate of Tagaung took cognizance of the case, and, after taking evidence for the prosecution and examining the accused, charged Nga An under section 379 and sent him to the Subdivisional Magistrate for whipping under section 349, Criminal Procedure Code, and discharged the applicant Nga Kun. He also directed the arrest of a man named Nga Nyo, who was present in court, as he thought from the evidence that he ought to be prosecuted under section 489 in connection with the same transactions.

The Subdivisional Magistrate seeing that the 3rd class Magistrate had no jurisdiction to try a case falling under section 411, Indian Penal Code, directed (Applicant) Nga Kun to be re-arrested and tried along with the other two. He thought the 3rd class Magistrate had *tried* Applicant Nga Kun, and that his proceedings were therefore void under section 530, Criminal Procedure Code.

Applicant Nga Kun, now comes before me and it is contended on his behalf that the Subdivisional Magistrate took cognizance of the charge against him under section 190 (*1*) (*c*), Criminal Procedure Code, and therefore, as he did not comply with section 191, his proceedings are void.

In the case of *Nga Paing and others v. Queen-Empress** it was no doubt stated that failure to comply with the provisions of section 191 is a material defect which invalidates the proceeding, and not a mere formal irregularity. But the case was decided on another ground. The point is referred to but not decided in *Nga Ba v. King-Emperor*†. In the present case also I do not think it is necessary to decide it. The ground on which *Nga Paing's* case was decided appears to me to cover the present case. It was there held on the authority of two Calcutta Rulings to which I have referred, that when a Magistrate has duly

* U. B. R., 1897-01, 1, 56. | † U. B. R., 1902-03, Cr. Pro. 21.

63

NGA KUN v. KING-EMPEROR.

taken cognizance of an offence on a complaint or on a police report, and finds from the evidence before him that certain persons not already accused should be tried for being concerned in it, he is justified in making them accused persons in the case, does not proceed under section 190 (*1*) (*c*), and is not debarred from trying the case.

The essence of the Calcutta cases was that it is not necessary that a complaint (or a police report) should expressly charge an accused person to give the Magistrate jurisdiction to deal with him under clause (*a*) or clause (*b*).

In the present case the 3rd class Magistrate's proceedings, so far as regards Nga An, were quite regular, though no doubt what he ought to have done, seeing that (Applicant) Nga Kun was jointly charged with him, was to send both to the Subdivisional Magistrate without holding any proceedings himself.

As regards Nga Kun (Applicant) it is perhaps open to some doubt whether he should be held to have "tried an offender" [section 530 (*p*)]. "Trial of an offender" is not defined in the Criminal Procedure Code. But I think that what the Code contemplates is that the *trial* of an accused person begins when he is called upon to plead to a charge and that a Magistrate's proceedings before this stage has been reached are in the nature of an enquiry. This view appears to be supported by the language of sections 177-184, 209, 253-254, 256, 347, 403 and 451.

As far, however, as the present case is concerned, I am of opinion that the point is immaterial. If a Magistrate's proceedings in a warrant case down to the discharge of the accused do not amount to the trial of an offender, the 3rd class Magistrate's proceedings in regard to Applicant Nga Kun are covered by section 529 (*e*). He took cognizance of an offence falling under section 411, Indian Penal Code, as far as can be seen erroneously in good faith, and his proceedings are not void and cannot be set aside. On the other hand, if in what he did in regard to Nga Kun he tried an offender his proceedings were void under section 530 (*p*). In either case there was nothing to interfere with further proceedings against Applicant Nga Kun.

As regards Nga Nyo, the 3rd class Magistrate was not competent to try an offence punishable under section 489, and therefore he was not empowered by section 65 to arrest Nga Nyo in his presence. But I think that on the decision in *Nga Paing's* case and the Calcutta Rulings there referred to, the 3rd class Magistrate must be presumed to have taken cognizance of the charge against Nga Nyo, on the Police report. When the proceedings came before the Subdivisional Magistrate he took cognizance under section 349 as regards Nga An and under section 346 as regards Nga Nyo, and I think there can be no doubt that he was then in the same position he would have occupied if the Police report had been presented to him direct, and that he had full power to proceed against Applicant Nga Kun and Nga Nyo under section 190 (*1*) (*b*), as explained in the ruling in *Nga Paing's* case. The irregular proceedings of the 3rd class Magistrate in

64

reference to Applicant Nga Kun and Nga Nyo could not affect the Subdivisional Magistrate's jurisdiction. The order of discharge, even if it was valid as explained in *Mi The Kin* v. *E Tha*,* did not need to be set aside. Its existence was no bar to further proceedings, and the Subdivisional Magistrate seeing that the 3rd class Magistrate had acted without jurisdiction in discharging applicant was only doing what was right in proceeding against him as if nothing had happened. The learned advocate contends that *Mi The Kin's* case is distinguishable because here the Subdivisional Magistrate had neither complaint nor Police report before him so far as Applicant was concerned. But this contention is not tenable, in view of the decision in *Nga Paing* and *others* v. *Queen-Empress*, already referred to. So in respect to Nga Nyo, I hold that the Subdivisional Magistrate was taking cognizance of the offence under clause (*b*) of section 190(*1*), and that the 3rd class Magistrate's irregular proceedings did not affect this jurisdiction, which the Subdivisional Magistrate had.

The District Magistrate, when the proceedings came to his notice, pronounced the whole of the 3rd class Magistrate's proceedings void under section 530. But, as will be seen from what has gone before, this was as incorrect as it was unnecessary.

As regards the merits of the case, I see no ground for doubting that the Applicant and the other two accused were rightly convicted. The Sessions Judge no doubt altered the conviction to section 489, because there was no evidence of any *moving* (section 378, Indian Penal Code). The offence was none the less serious and the sentences were by no means excessive.

* U. B. R. 1904-05, Cr. Pro., 19.

Criminal Procedure—488.

Before G. W. Shaw, Esq.

MI LE *v.* NGA PAW DIN.

Criminal Revision No. 932 of 1905. December 12th.

Mr. C. G. S. Pillay—for applicant. | *Mr. H. N. Hirjee*—for respondent.

The primary questions to be decided in reference to the claims of a wife for maintenance are (1) whether the husband has sufficient means (2) whether he neglects or refuses to maintain his wife. The language of the section is inconsistent with the capacity of a wife to make a contract absolving her husband from his statutory liability. Where a settlement has been made, whether intended to be final or not, the question for determination is whether that settlement now furnishes sufficient means of support.

References:—

U. B. R. 1892—1896, I, 64.
———1897—1901, I, 108.

In 1901 applicant applied for maintenance for herself and child, but on receipt of Rs. 300 from respondent withdrew her application. This was on the 27th May 1901. In October 1903 she applied again stating that the Rs. 300 had been expended, respondent objected that the Rs. 300 had been paid in final settlement of all claims The Magistrate made an order for Rs. 6 a month for the applicant and Rs. 3 for the child. On the 27th January 1904, my predecessor modified this order by disallowing maintenance for the applicant herself. The ground on which he proceeded was that "the sum applicant received was sufficient to keep her for a good deal more than 30 months if she had not simply lived on the capital." It was also remarked that "it is extremely improbable that" respondent "would have paid such a large sum at all unless it was agreed to be a final settlement and in point of fact it should be quite sufficient if prudently managed." But "whether the wife can by contract absolve the husband from his statutory liability" was not decided. On the 7th June 1905 applicant (for the third time) renewed her application for maintenance. She gave evidence herself to the effect that the whole of the Rs. 300 had been expended, mainly on payment of debts, and in consequence of her illness. The respondent on the other hand gave evidence, himself that he paid the Rs. 300 in satisfaction of all claims and also that he had no property of his own, but his mother was well-to-do and had property.

The Subdivisional Magistrate in his final order was not every consistent. After saying that the intention of the law is to restrain a man from leaving his wife.....whom he is able to support to be a burden on the public or on private charity (a quotation from *Mi Su* v. *Sasson**), he goes on to say that the respondent in the first instance made ample provision for.. ...his wife.....if the money, the capital, had been properly managed (almost a quotation from Mr. Irwin's order of 27th January 1904), and then he "does not see what further claim the applicant has on respondent." This was begging the question.

* U. B. R., 1892-96, I, 64.

MI LE
v.
NGA PAW DIN.

I am of opinion that the language of the section which is plain and intelligible must be adhered to and what it says is this :—

"If a person having sufficient means, neglects or refuses to maintain has wife..... the District Magistrate, etc, may upon proof of such neglect or refusal order such person to make a monthly allowance, etc." It may be that if the respondent had invested the Rs. 300 instead of paying it to applicant or if applicant had invested it herself it would have yielded a sufficient income to maintain her for the rest of her days. But this is immaterial if in fact the money was spent or lost, and is so longer yielding a sufficient income.

I hold that the plain provision of the law above quoted is inconsistent with a wife making a contract to absolve the husband from liability. As Mr. Burgess observed the object of the law is to prevent the wife whom her husband is able to support from becoming a burden on other people, and this object would not be obtained by a contract which ultimately left the wife to the charity of her neighbours.

Again the section does not say that a wife is not eligible for maintenance if she is able to maintain herself, or if she has made a bad use of money which her husband gave her some time back.

As in the case of a settlement for the maintenance of a child (dealt with in *Nga Mya* vs. *Mi Bok Son* * and cases there referred to), the question is whether the settlement made by the husband still furnishes sufficient means for the wife's support. The magistrate examined no witnesses but the parties and their statements were not sufficient to base a proper finding upon.

I set aside the Magistrate's order dismissing the application and direct that he proceed to enquire into the points necessary to be determined and that he then pass a fresh order.

It is admitted that applicant is respondent's wife. What the Magistrate then has to find out is (1) whether respondent has sufficient means and (2) whether he refuses or neglects to maintain applicant. On the last point what has to be ascertained in the present case is whether the Rs. 300 which respondent paid to applicant in 1901 is still furnishing sufficient (or any) means of support for applicant.

* U. B. R., 1897-01, I, 108.

Criminal Procedure—392, 393.

Criminal Revision No. 444 of 1906. May 29th

Before G. W. Shaw, Esq.

KING-EMPEROR *v.* NGA PO KYAN.

Held—that under the provisions of sections 392 and 393 of the Criminal Procedure Code, not more than one sentence of whipping, and that not exceeding 30 stripes, should be awarded at one time.

REFERENCES :—

U. B. R., 1897-01, I, 247.
———, 1892-96, I, 44.
P. J. L. B., 582.
9 W. R., Cr. 41.
14 W. R., Cr. 7.

The accused, a youth under 16 though physically and mentally older was convicted in one trial of stealing a pony and sentenced to two years' rigorous imprisonment, and in another of mischief by fire and theft of a saddle and other property, and sentenced to a whipping of 30 stripes for each of these offences. The District Magistrate directed that one whipping should be inflicted as soon as practicable and the other in six months' time.

The proceedings relating to the theft of the pony have not been submitted. But the accused's confession shows that the pony belonged to one Ya Gyaw, and was stolen from his house. The theft of the saddle and other things from *ex*-Myoôk Maung San Ôn's house was therefore a distinct offence.

But the two sentences of whipping aggregating 60 stripes cannot, in my opinion, be sustained. They are, it may be noted to begin with in contravention of the directions contained in paragraph 115, Upper Burma Courts Manual.

In *Queen Empress* vs. *Kanza and Po Kin** where a District Magistrate passed a sentence of whipping after having awarded a sentence of seven years' transportation in another case on the same day, it was held that the whipping was against the spirit if not the letter of section 393. By section 392, Criminal Procedure Code, it is declared that in no case shall the punishment of whipping exceed 30 stripes, by section 393 that no sentence of whipping shall be executed by instalments. I think that to pass two sentences of whipping of 30 stripes each and direct that one sentence is to be executed as soon as practicable and the other six months' hence is to infringe both these rules in the spirit if not in the letter.

In the case of solitary confinement, where section 73, "Indian Penal Code, empowers a Court to award solitary confinement whenever any person is convicted of any offence for which . . . the Court has power to sentence him to rigorous imprisonment," and imposes the limitation "not exceeding three months on the whole," it has been held in the anonymous case reported at page 146, volume I of the Upper Burma Rulings for 1892-96 and in *Queen Empress* vs. *Nga Kaing*† that cumulative sentences of solitary confinement in excess of three months

* U. B. R. 1892-96, I 44. | † U. B. R. 1897-10, I, 247.

1906.

KING-EMPEROR v. NGA PO KYAN.

are illegal. In the latter it was said, quoting from an unpublished case "Though the case of different convictions is not specially provided for, it seems clear that the spirit of the law is against prolonged solitary confinement." Also "the fact that in section 73 of the Indian Penal Code the term of solitary confinement cannot exceed three months whatever may be the term of sentence, clearly indicates the intention that this is the maximum period of solitary confinement that can be judicially awarded in a continuous period of imprisonment."

So here it appears to me that the provisions of the Criminal Procedure Code above cited clearly indicate the intention, that not more than one sentence of whipping and that not exceeding 30 stripes should be awarded at one time.

The question was examined and the same conclusion arrived at by the Judicial Commissioner, Lower Burma, in *Queen Empress* v. *Paw Dun*.* The Calcutta decisions there referred to, *viz.*, *Nasir* v. *Chandar and others*† and *Ratan Bewa* v. *Bahar*‡ appear to be sufficient authority for this interpretation of the law.

I set aside the sentence in the case of theft of a saddle and other property from Maung San Ôn's house. I do not think it necessary to pass any sentence in lieu.

* P. J. L. B. 582. † 9 W. R. Cr. 41. ‡ 14 W. R. Cr. 7.

70

Criminal Procedure—421.

Criminal Revision No. 383 of 1906. June 21st.

Before G. W. Shaw, Esq.

KING-EMPEROR *v.* NGA SEIN GYI.

Mr. *H. M. Lütter*, Government Prosecutor, for the Crown.

It is not necessary for an Appellate Court in dismissing an appeal summarily to write a judgment.

References:—

I. L. R., 17 All., 241.
——— 20 Bom., 540.
——— 21 Cal., 92.
——— 29 Cal., 726.
——— 25 Mad., 534.
U. B. R., 1904-05, 1, Criminal Procedure, page 41.
Weir's Reports 1009.

This case has been referred by the Sessions Judge, Minbu in order that it may be determined whether in dismissing an appeal summarily under section 421, Criminal Procedure Code, it is necessary for the Appellate Court to write a judgment. I have had the advantage of hearing the learned Government Prosecutor and have referred to the decisions which he has cited, namely, *Bala Subanna** (1883), *Rash Bihari Das* v. *Balgopal Singh*† (1893), *Queen-Empress* v. *Waru Bai*‡ (1895), *Queen-Empress* v. *Nannhu*§ (1895), (F. B.,) and *King-Emperor* v. *Krishnayya*‖ (1901). These cases show that the Indian High Courts are practically unanimous in holding that an Appellate Court in dismissing an appeal summarily is not bound to write a judgment. This weight of authority is no doubt amply sufficient ground for a decision. But it may be well to state that an independent examination of the Criminal Procedure Code tends to the same conclusion.

The Code is undoubtedly obscure on the point. It does not expressly define a judgment or prescribe when a judgment is to be written. But taking the case of original proceedings first, it is to be observed that section 366 speaks of the judgment in "every *trial*." "Trial," as I recently observed in *Nga Kun* v. *King-Emperor*,¶ appears from various provisions of the Code to be the term used to describe proceedings in a criminal prosecution after the accused has been called upon to plead to the charge. If this is correct, the term "judgment" would not apply to an order dismissing a complaint or to an order discharging the accused. As regards the former, this conclusion seems to be borne out by section 203, which requires the Magistrate to record his reasons. If the order had been a judgment this provision would have been unnecessary. As regards an order of discharge there is the authority of the opinion of two judges of the Calcutta High Court in

* Weir's Reports 1009.
† I. L. R., 21 Cal., 92.
‡ I. L. R., 20 Bom., 540.
§ ——— 17 All., 241.
‖ I. L. R., 25 Mad., 534.
¶ U. B. R., 1904-05, 1, Criminal Procedure, page 41.

KING-EMPEROR v. NGA SEIN GYI.

Mir Ahwad Husain v. *Muhammad Askari** that an order of discharge is not a judgment.

The provisions of the Code relating to judgments in original proceedings are extended to proceedings in appeal by section 424. On the analogy of the original proceedings it is reasonable to hold that an appeal is not heard till notice has been given to the Respondent and he has had the opportunity of opposing the appeal, and that a judgment is only required when an appeal is heard. It would follow I think that an order dismissing an appeal summarily is not a judgment.

For these reasons I am of opinion that the order in question dismissing an appeal summarily without any statement of reasons was a legal order.

The proceedings are returned.

* I. L. R., 29 Cal., 720.

Criminal Procedure—250 (*a*), 537.

Criminal Revision No. 543 of 1906. August 8th.

Before G. W. Shaw, Esq.

KING-EMPEROR *v.* NGA PWE.

Held,—that a Magistrate trying a case summarily is bound to record under the proviso to section 250, Criminal Procedure Code, any objection which the complainant or informant may urge and that the omission to comply with the proviso in this respect is not covered by section 537, Criminal Procedure Code, or by section XV of the Schedule to the Criminal Justice Regulation.

References:—
I. L. R., 11 Mad., 142.
——— 25 All., 315.
P. J. L. B., 528.
5 C. W. N., 214
U. B. R., 189 -96, I, 35.

The Magistrate tried a case falling under section 426, Indian Penal Code, summarily, and in his order of acquittal directed the complainant to pay Rs. 5 compensation under section 250, Criminal Procedure Code, but he omitted to record what the complainant had to say against the making of the direction as required by the section. The District Magistrate has referred the case, being of opinion that this omission was a fatal defect and that the order should be set aside.

I cannot find any published decision directly bearing on the point. In *Queen-Empress* v. *Basava*[1] it was held that "Section 262, Criminal Procedure Code, renders applicable all the provisions of section 250," that is to say, that a Magistrate trying a case summarily is at liberty to make an order under section 250. But it does not appear that it was considered or intended to decide the question whether a Magistrate trying a case summarily is at liberty to make an order under section 250 without complying with proviso (*a*) to that section in regard to the recording of the complainant's objection.

In *an anonymous case*[2] Mr. Burgess held that it was a defect of procedure which could not be cured by section 537, Criminal Procedure Code, or section XV of the Schedule to the Criminal Justice Regulation, to make an order under section 250, after the order of discharge or acquittal, section 250 authorizing a Magistrate to direct payment of compensation *by his order of discharge or acquittal*, and not otherwise. A similar view was taken by the late Chief Judge of the Chief Court, Lower Burma, in *Queen-Empress* v. *Abdul Karim*[3] and by the Allahabad High Court in *In the matter of the complaint of Sufdar Husain*.[4] The learned Judge in the last mentioned case said "he" (the Magistrate) "was bound under the proviso to the section to record and consider any objection which the complainant might urge before he directed compensation to be paid; and if he directed compensation to be paid he was bound under clause (*b*) of the proviso to state his reasons for awarding compensation in his order of discharge or acquittal." In *Suchandi Kolitani* v. *Dom Kolita* it was held by a Bench of the Calcutta High Court, that

[1] I. L. R., 11 Mad., 142.
[2] U. B. R., 1892-96, I, 35.
[3] P. J. L. B., 528.
[4] I. L. R., 25 All., 315.
[5] C. W. N., 214.

KING-EMPEROR v. NGA PWE.

an order under section 250, Criminal Procedure Code, was bad by reason of the Magistrate having failed to record and consider any objection which the complainant might urge against the making of such order before he passed it. The view which the learned Judges took was that the Magistrate had not proceeded according to law.

It does not appear that any of the four cases last cited was tried summarily. But the High Court's orders proceed on the ground that the procedure laid down in the section is an essential part of the order.

On a consideration of the language of the section my opinion is to the same effect. It permits a Magistrate to direct payment of compensation in certain circumstances, *viz*, (1) when he discharges or acquits the accused, (2) when he is satisfied that the accusation against him was frivolous or vexatious, and (3) by his order of discharge or acquittal, and subject to the proviso that before making any such direction he shall (*a*) record and consider any objection the complainant or informant may urge, and (*b*) state in writing in his order of discharge or acquittal his reasons for awarding compensation. Except in the circumstances specified and subject to the double proviso annexed, the Magistrate is not authorized to direct payment of compensation.

This being so the provisions relating to summary trials do not appear to me to justify a Magistrate in omitting to record the complainant's objection. Chapter XXII obviously deals with the ordinary proceedings in an enquiry or trial, and not with special provisions such as those contained in section 250. In this view it follows that the Magistrate's omission to comply with the proviso to section 250 was more than a mere irregularity which would be covered by section 537, Criminal Procedure Code, or by section XV of the Schedule to the Criminal Justice Regulation

I hold therefore that the order in question was bad and I set it aside.

74

Criminal Procedure, 342 (4).

Criminal Appeal No. 52 of 1906. August 28th.

Before G. W. Shaw, Esq.

NGA PO YIN *v.* KING-EMPEROR.

Mr. H. N. Hirjee, Officiating Government Prosecutor, for the Crown.

Held,—*that an accomplice is a competent witness against a co-accused tried separately.*

Held also—*that the confession of an accused person who is dead implicating himself and an accomplice in a crime is admissible under section* 32 (3) *Evidence Act, and is not excluded by illustration* (b) *to section* 30.

See Evidence, page 3.

Evidence—6, 8.

Criminal Appeal No. 101 of 1905. April 5th, 1906.

Before G. W. Shaw, Esq.

NGA HLWA *v.* KING-EMPEROR.

Mr. Lüter, Government Prosecutor, for the Crown.

The accused was charged with ravishing a child of 4, who was unable to give evidence. The injuries received by the child might have been caused by any accident.

Evidence was offered of statements made by the child (1) to her grandmother immediately after receiving the injuries, (2) to the headman, later when examined by him.

Held—*that the statement to the grandmother was the only statement that could possibly be proved (under section 8, Evidence Act), and that the grandmother's evidence as to that statement was insufficient to support a conviction.*

See Penal Code, page 31.

Evidence—21, 30, 32, 118, 133.

Criminal Appeal No. 52 of 1906 August 28th.

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Held—that an accomplice is a competent witness against a co-accused tried separately.

Held also—that the confession of an accused person who is dead implicating himself and an accomplice in a crime is admissible under section 32 (3), Evidence Act, and is not excluded by illustration (*b*) to section 30.

References:

10 C. W. N., 962.
P. J. L. B., 363.
I. L. R., 11 Cal., 635.
———, 12 Mad., 153.
———, 14 Bom., 260.
———, 25 Cal., 413.
U. B. R., 1892—96, I, 83.

Appellant Po Yin has been convicted under sections 302—109, Indian Penal Code, and sentenced to transportation for life with respect to the murder of Kôn Min at Yagyigôn on the 7th November last. The Sessions Judge refrained from awarding the supreme penalty because there was no evidence as to the exact part Appellant took.

One Pya Nyo was first tried for the offence. He was convicted, sentenced to death and hanged (*see* Criminal Appeal No. 6 of 1906 of this Court).

Kôn Min had Rs. 175 on his person, which his uncle had sent him with to buy oil. He was decoyed outside the village fence at night, and deliberately murdered for the sake of this money. Pya Nyo confessed to having been concerned in the commission of the crime, along with two other men, *viz.*, Appellant Po Yin and one Po Kywe, a witness for the prosecution. His story was as follows:—Appellant Po Yin went and fetched the *da*, while he (Pya Nyo), Po Kywe and the deceased went out of the village gate and waited in a field near by. When Appellant arrived Po Kywe took the *da* from him and felled deceased by two cuts on the neck. Appellant Po Yin then took the *da* and finished deceased off by cutting off his head. Pya Nyo followed this up by cutting the deceased's money-belt, and taking out the money, which the three proceeded to divide between them, Pya Nyo getting Rs. 80, Appellant Rs. 65 and Po Kywe Rs. 35 "as he had borrowed much money from Kôn Min before his death and spent it."

This was Pya Nyo's confession to the Magistrate. He had previously—before the arrival of the Police on the scene—made confessions to the headman's nephew and to relations of his own, in which he assigned to himself a more prominent part in the actual murder.

On the 23rd the decomposed body of Kôn Min with the head cut off was found in the field, and the money-belt with its contents was missing.

79

NGA PO YIN v. KING-EMPEROR.

Rupees 80 (one of them stained with blood) were found hidden in the place where Pya Nyo said he had concealed his share, found in consequence of his statement.

Three out of 6 rupees found in possession of Appellant's wife were blood-stained. Fifty-nine other rupees were found in consequence of a statement which Appellant made to the Police.

If Pya Nyo's story was substantially true all three men were equally deserving of death, and I am unable to understand the Session Judge's reason for awarding a less penalty to the Appellant.

The question is, however, whether Appellant has been legally proved to be guilty. Three points of great difficulty arise.

First, is the confession of Pya Nyo admissible? Appellant was sent before the Committing Magistrate along with Pya Nyo, but the Magistrate discharged him. The Sessions Judge ordered the Magistrate to commit him. But he was not tried along with Pya Nyo. Pya Nyo had been hanged by the time Appellant came to be tried. It was proposed to put Pya Nyo's confession in evidence under section 32 (3), Evidence Act. Appellant's Advocate objected that it was irrelevant. The question at issue being whether Appellant was one of the murderers of Kôn Min, the fact that Pya Nyo with Appellant and Po Kywe murdered Kôn Min was manifestly relevant (section 5, Evidence Act). Pya Nyo's statement to this effect would therefore be relevant under section 32 (3) unless its admission was barred by some other provision. I think therefore that what the objection probably meant was that the statement was excluded by section 30.

For the following reasons I am of opinion that section 30 does not apply. Section 21 contains the general rule that an admission (which includes a confession) can be proved against the person who made it, but not by or on his behalf except in specified cases. One of the exceptions is where the admission is of such a nature that if the person making it were dead, it would be admissible as between third persons under section 32. Another is where an admission is relevant otherwise than as an admission. This shows that if an admission falls within section 32 it may be proved independently of the general rule stated in section 21. Section 30 merely enacts a special exception to the general rule that a confession (admission) can be proved (only) against the person who made it. It does not limit the operation of section 32. Illustration (*b*) to section 30 cannot, in opinion, be construed to have this effect.

The learned Sessions Judge held the confession in question inadmissible on another ground. He applied the English rule quoted under clause (1) of section 32 by Amir Ali and Woodroffe, that the person making the declaration must be competent, and he held that Pya Nyo was not a competent witness against Appellant at the time he made the confession. But it is not at all clear that the English rule referred to applies to clause (3). The English law has different rules for the two cases, *e.g.*, in a case falling under clause (1) hearsay is not admissible, in one falling under clause (3) it is. And as regards interest in escaping a criminal prosecution, clause (3) introduces a provision which differs from the English law.

80

As the Sessions Judge has remarked, Sir W. Cunningham in his Commentary on section 32 gives it as his opinion that the "question of the competence of the person to bear testimony is not one which affects the admissibility of the statement" under any of the clauses of the section.

If a co-accused were incompetent to give evidence, and the rule of competency applied to section 32 (3), the effect would be to nullify the provision as to statements relating to interest in escaping a criminal prosecution.

But I am clearly of opinion that the learned Sessions Judge was in error in holding that Pya Nyo was not competent. The law is contained in sections 18 and 133, Evidence Act, and the only limitation imposed on the general rule there stated is that involved in the application of section 342 (4), Criminal Procedure Code. If Pya Nyo and Appellant were being tried jointly, Pya Nyo could not be sworn and therefore could not be a witness against Appellant. But if they were being separately tried this prohibition would not apply. The question is dealt with at length in the recent Calcutta case of *Banu Singh* v. *King-Emperor* * (1906) *cf.* Amir Ali and Woodroffe's notes to section 118.

For these reasons I hold that Pya Nyo's confession was admissible in the present case under section 32 (3) as a statement which would expose him to a criminal prosecution. And it is clear from the instances given in Amir Ali and Woodroffe that the *whole* of Pya Nyo's confession was admissible, *cf.* Field's notes to the same section and clause. Not only that part of the statement which is against interests is admissible, but all those parts of it which relate to connected facts. This includes the parts referring to the share taken by Appellant and by Po Kywe in the murder as well as the parts referring to Pya Nyo's own share.

The next point is as to the confession of Appellant to the Police, and how much of it is admissible under section 27, Evidence Act.

It is not very clearly brought out what Appellant precisely said. But it may be taken that what he said was this,—that he received Rs. 65 as his share of the money obtained by the murder of Kôn Min in which he was concerned, and that he gave Rs. 6 to his wife, and buried Rs. 59 under a water-pot stand, but when the Police came he was frightened and told Po Sin to dig up the Rs. 59 and give them to Kyaw Din. In consequence of this statement Rs. 55 were obtained from Kyaw Din, and Rs. 4 from below the water-pot stand, where Po Sin had left them. Rs. 6 had been already obtained from Appellant's wife before he confessed.

The Sessions Judge has rightly excluded that part of the statement which relates to the Rs. 6 and the part relating to Appellant having been concerned in the murder of Kôn Min, but he appears to have admitted the part which says that the Rs. 59 were Appellant's share of the money taken from Kôn Min. I have referred to all the decisions cited in the judgment of the Sessions Court, and

* 10 C. W. N., 962.

NGA PO YIN v. KING-EMPEROR.

also to *San Bwin* v. *Queen-Empress** (1893), and the Lower Burma case of *Tha Ya* v. *Queen-Empress*† (1897) which the learned Government Prosecutor has brought to my notice.

All these cases, leaving out the two which, as the Sessions Judge remarked have no bearing on the point, seem to me to be substantially to the same effect.

In *Adu Shikdar* v. *Queen-Empress* ‡ (1885) it was declared that not a word more than is necessary should be admitted. That was a case where the accused was charged with robbery and made a confession to the Police that he had robbed Kristo Rishi of Rs. 48 whereof he had spent Rs. 8 and had Rs. 40. He handed over Rs. 40 to the Police. But nothing was discovered in consequence of his statement that he committed the robbery and had Rs. 40 of the stolen property.

In *Queen-Empress* v. *Kamar Sahib*§ (1888) the confession was that the accused had deposited certain clothes with witnesses who delivered them up when called upon to do so. This was held admissible. But if the accused had also said that he stole the clothes that would not have been admissible.

Queen-Empress v. *Nana*‖ (1889) was a case in which a Full Bench of the Bombay High Court laid it down that only so much of the information as distinctly led to the discovery is admissible, and hence the statement that the accused buried certain property in the fields where it was in consequence found was held admissible, the statement that he kept it was held inadmissible. The charge was one of dishonestly receiving stolen property.

The Legal Remembrancer v. *Chema Nashya* ¶ (1897), followed *Queen-Empress* v. *Nana*, and there is nothing in it to render admissible more than what distinctly led to the discovery.

The Lower Burma case above cited applies the rule with perhaps greater strictness.

The learned Sessions Judge apparently overlooked *San Bwin's* case since he remarked that he could find no Ruling of this Court. It states the law in precisely the same way. It was a case of robbery and the robbers had had a knife and small gun or short firearm. The accused made a confession which led to the discovery of a revolver and cartridges and a knife. The confession had been illegally induced. But Mr. Burgess said "Even if it could be admitted, it would go a very short way, for all it would show would be that Appellant had buried or knew the place where there had been buried a revolver and cartridges and a knife. There would be no necessary connection between the exhibits found and the robbery." The confession of the robbery to the Police was held to be "inadmissible beyond the matter relating to the bare fact of the discovery."

On the principle enunciated in these Rulings, it appears to me that in the present case the Appellant's statement that Rs. 65 (or Rs. 59)

* U. B. R., 1892—96, I, 83.
† P. J. L. B., 363.
‡ I. L. R., 11 Cal., 635
§ 12 Mad., 153.
‖ L. R., 14 Bom., 260.
¶ I. L. R., 25 Cal., 413.

82

was money which he got from Kôn Min and part of the produce of the robbery, is as clearly inadmissible under 27, Evidence Act, as the statement that he was concerned in the murder.

All that led to the discovery of the Rs. 59 was his statement that he buried Rs. 59 under the water-pot stand and told Po Sin to dig them up and give them to Kyaw Din.

The third point is the admissibility of the evidence of Po Kywe. This is the same question already dealt with in reference to the competence of Pya Nyo to give evidence against Appellant. For the reasons there given I must hold that Po Kywe's evidence is admissible.

We have now to consider what weight to attach to the evidence which I have held to be admissible.

Pya Nyo's confession, as I have said, introduces important variation on the confessions he made to the headman's nephew and to his own relations. It is open to the same objections as the evidence of an accomplice. It is even less valuable since it was not made on oath and "the guarantee for its truth is a very weak one" (Amir Ali and Woodroffe's Notes to section 30, Evidence Act). And according to the general rule it must be corroborated by independent evidence and not by the testimony of accomplices (*ib*). The only independent evidence here is the bare fact of Rs. 59 having been found on information given by Appellant and Rs. 6 (Rs. 3 blood stained) having been found in possession of Appellant's wife, which together make Rs. 65, the share Pya Nyo says Appellant got, and the discovery of Rs. 80 (including Re. 1 blood stained) in the place where Pya Nyo says he buried his share.

As to Po Kywe, I am of opinion that in the face of Pya Nyo's confession the inference which the Sessions Judge draws from his evidence is not admissible. It cannot be taken to suggest that Appellant was one of the three men who went out of the gate together. It goes no further than asserting that while Kôn Min was still in the village with Pya Nyo, Appellant like Po Kywe himself was in their company. It is further evident that no reliance whatever can be placed on Po Kywe's statement to this effect without corroboration, and the fact that he made the same statement when first questioned does not, in the circumstances, amount to corroboration of any appreciable value.

We are thus practically reduced to Pya Nyo's confession corroborated, as I have noted above, by the discovery of Rs. 59 *plus* Rs. 6 (including Rs. 3 blood stained), and the discevery of Rs. 80 (including Re. 1 blood stained).

The coincidence of Rs. 59 *plus* Rs. 6 being equal to Rs. 65, is discounted by the fact that Rs. 14 besides were found in possession of Appellant's wife.

Again the three blood stained rupees are a highly suspicious fact. But obviously no certain conclusion can be drawn from it.

On full consideration I am of opinion that Pya Nyo's confession is not sufficiently corroborated, or sufficiently worthy of credit in itself to support the conviction of Appellant.

I therefore set aside the conviction and sentence and direct that appellant be acquitted of the offence of abetment of the murder of Kôn Min at the time and place above stated, and that he be released.

Excise—45, 51.

Before A. M. B. Irwin, Esq.

Criminal Revision No. 24 of 1904. January, 29th.

KING-EMPEROR *v.* NGA SAN DUN.

Held—that distilling spirit and possessing the spirit obtained by such distillation are not distinct offences within the meaning of section 35, Code of Criminal Procedure, and a double sentence is prohibited by section 71, Penal Code.

Although under section 235 (1), Code of Criminal Procedure, separate convictions for the two offences are legal, yet it is neither necessary nor desirable to convict for possessing spirit when the manufacture is proved.

References:—

1, U.B.R., 1892—96, page 93.
1, L.B.R., page 33 (1900).

See Penal Code, page 1.

Excise—45.

Before A. M. B. Irwin, Esq., C.S.I.

KING-EMPEROR *v.* MI THIT.

Criminal Revision No. 969 of 1904. March 3rd, 1905.

Tapping a *tari* tree, or leaving sweet *tari* to ferment, is not manufacturing *tari*.

References:—
L. B. P J., 336.
1 L. B. R., 214.
U. B. R., 1892—96, 98.

The facts found are that Mi Thit took some fermented *tari* from a pot which was kept in a ditch outside the village and went away. After a time she came back and put some fresh *tari* into the same pot. She had been watched, and an attempt was then made to arrest her, and she broke the pot and the *tari* was spilled. On these facts she was convicted of manufacturing fermented *tari*. This conviction cannot stand. Mr. Hosking showed very clearly in the case of *Queen-Empress* v. *Ngo Shwe Hman*,* referred to in Excise Direction 43, that tapping a *tari* tree is not manufacturing *tari*, and that leaving sweet *tari* to ferment is not manufacturing either, as sweet *tari* the moment it is tapped is fermented liquor within the meaning of the Excise Act. The offence of manufacturing fermented *tari* is therefore a physical impossibility.

A person who taps *tari* trees and collects more than four reputed quart bottles of *tari* at one time may be convicted of illegally possessing *tari*, but in the present case there is neither allegation nor evidence that Mi Thit possessed more that that amount of *tari*. *See The Crown* v. *Nga Than Nyin* † and *Queen-Empress* v. *Nga On Cho*.‡

I therefore reverse the conviction and sentence passed on Mi Thit and direct that the fine be refunded.

* L. B. P. J., 336. | † 1, L. B. R., 214. — ‡ U. B. R., 1892—96, 98.

87

Excise—45.

Criminal Revision No. 789 of 1905. November 28th

Before G. W. Shaw, Esq.

KING-EMPEROR *v.* NGA BEIK KYI.

Mr. H. M. Lütter—Government Prosecutor, for the Crown.

The use of artificial means to hasten the fermentation of what is already fermented liquor, and to preserve it or make it more palatable does not amount to making or manufacturing fermented liquor within the meaning of section 45 of the Excise Act.

References :—

U. B. R., 1905, Excise 45, page 3.
Criminal Revision 107 of 1905 (unpublished).

In the case of *King-Emperor* v. *Mi Thit*,* the accused had been convicted of "manufacturing fermented *tari*" by putting (so-called) fresh *tari* into a pot that contained or had contained (admittedly) fermented *tari* and it was held by Mr. Irwin that the offence of manufacturing fermented *tari* could not be committed, because *tari* was already fermented liquor within the meaning of the Act from the moment it was tapped. The conviction and sentence were therefore set aside. I am unable to concur with the learned Sessions Judge who has referred the present case when he says that Mr. Irwin's opinion was an *obiter dictum*, since the decision of the case did not depend on it. It appears to me that the decision did depend on the view which Mr. Irwin took that the offence of manufacturing *tari* could not be committed, because *tari* was already fermented liquor from the moment it was tapped. It was expressly based on this ground.

So in the unpublished case of *King-Emperor* v. *Thet She* (Criminal Revision No. 107 of 1905 of this Court) although the conviction could not be sustained because it was based on inadmissible evidence of a confession to a police officer, it was also held that (even if the evidence had been admissible) the conviction could not be sustained because putting *alin* into *tari* could not constitute manufacture since *tari* fermented spontaneously [*i.e.*, was already fermented liquor (from the time it left the tree)]. I am unable to agree that this was an *obiter dictum* either.

I do not know what the Sessions Judge refers to when he speaks of the Courts in Upper Burma being bound by the *obiter dicta* of the Judicial Commissioner.

The position appears to me to be unasssailable. *Tari* is fermented liquor from the moment it leaves the tree, and is so defined in the Excise Act (subject to a declaration by the Local Government). The case of *Queen-Empress* v. *Shwe Hman* cited in *King-Emperor* v. *Mi Thit* supports the view that the use of artificial means to assist (or

* U. B. R., 1905, Excise 45, page 3.

1905

NGA BEIK KYI v. KING-EMPEROR.

hasten) fermentation cannot in these circumstances amount to "manufacturing." To manufacture is to convert by some artificial process raw material into something else. Here the object of the use of *alin* and tree-barks, is not to convert raw material into something else, but merely to hasten fermentation and to preserve or improve (for drinking purposes) what is already fermented liquor.

That the natural process of fermentation is slow, and the result unsatisfactory from the consumer's point of view, appears to me to be immaterial. The excise law as it stands does not punish assisting the natural process of fermentation with the object of getting quicker and better results. Still less does it punish means taken to preserve or make fermented liquor more palatable.

The argument that the use of the artificial process will extend if convictions are not sustained, may be an argument for the amendment of the law, but as regards the interpretation of existing law is beside the point.

The Government Prosecutor who was instructed to support the conviction in this case, has been unable to do so. He admits that the use of artificial means to hasten the fermentation of what is already fermented liquor, and to preserve it or make it more palatable does not amount to making or manufacturing fermented liquor within the meaning of section 45, Excise Act. He also admits that the decision in *King-Emperor* v. *Mi Thit* rested directly on this point.

For these reasons I am of opinion that there is no reason for dissenting from the decision in *Mi Thit's* case and that the conviction in the present case was bad, and I set aside the conviction and sentence accordingly.

The proceedings are returned.

Excise 30 (1), (2.)

Criminal Revision No. 1118 of 1905. February 6th, 1906.

Before G. W. Shaw, Esq.

KING-EMPEROR *v.* NGA CHI.

Mr. Lütter, Government Prosecutor, for the Crown.

The accused, a Burman, was convicted under section 51, Excise Act, of illegal possession of 18 quart bottles of Younger's Monk Brand Beer.

Held,—that the possession of more than 12 quart bottles of beer being *primâ facie* illegal, it was for the accused when charged with the illegal possession to prove that he purchased the beer for his private use and not for sale.

References:—

Upper Burma Rulings, 1892—96, I, 107.
————————, 1897—01, I, 184.
————————, 1892—96, I, 100.
Agabeg's B. L. R., XI, Part V, 227.

Amir Ali and Woodroffe's Law of Evidence, section 105 (Commentary).

The accused, a Burman, was convicted under section 51, Excise Act, of illegal possession of 18 quart bottles of Younger's Monk Brand Beer. His defence was that he had the beer in his possession for his private use and not for sale. He did not say where he had got it and he called no witnesses.

Section 30 of the Act in clause (1) enacts that "no person shall have in his possession any . . . fermented liquor larger than that specified in section 3 (1), (*n*), unless he is permitted to manufacture or sell the same, or he holds a pass therefor from the Collector or other officer empowered by the Local Government to grant such passes."

And in clause (2) it goes on to say that "nothing in this section extends to any . . . foreign fermented liquor . . . purchased by any person for his private use and not for sale."

Younger's Beer comes under the description of foreign fermented liquor and the quantity specified in section 3 (1), (*n*), is 12 quart bottles. It has been held in *Queen-Empress* v. *Po Kywe* * that possession of foreign fermented liquor by a Burman in Upper Burma up to 12 quart bottles is not an offence merely because such liquor may not be sold to him. In that case the quantity in question was two quart bottles, and therefore it was not necessary to decide whether section 30 (2), (*a*), (the passage quoted above as to possession of liquor purchased by a person for his private use and not for sale) would protect a Burman from prosecution for possession of a quantity in excess of 12 quart bottles.

This is the point for determination in the present case.

In the second of the three anonymous cases published at page 100 of the Upper Burma Rulings for 1892—96, Volume I, Criminal Revision No. 1617 of 1892, it was laid down that a Burman purchaser of liquor (from the holder of a license in Upper Burma) is an abettor, and should be tried as well as the person abetted.

Queen-Empress v. *Ahyu and another* † deals with abetment in the parellel case of sale to a European soldier, and shows that the abettor

* U. B. R., 1892—96, I, 107. † U. B. R, 1897—01, I, 184.

KING-EMPEROR v. NGA CHI.

must intend that the seller knows the liquor is for a person to whom sale is forbidden.

These are the only decisions of this Court which go towards defining the position of the accused in the present case. The District Magistrate in submitting the case for orders and recommending that the conviction and sentence should be set aside relies on a recent ruling of Mr. Justice Fox in the Chief Court of Lower Burma, printed not in the Lower Burma Rulings but in Agabeg's Reports: *Crown* v. *Lipyin*,* where it was held that "there is no authority for" the presumption that liquor of which an accused person is in possession in excess of the quantities specified in clause (*n*) of seetion 3 (1) of the Act is for sale, and that "if an accused alleges that any foreign spirit or foreign fermented liquor in his possession is for his private use and not for sale, it is for the prosecution to show that he has it for sale." The learned Judge did not refer to section 105, Evidence Act, at all, an omission which strikes me as remarkable, for unless he inadvertently overlooked that section, he must have been of opinion that clause (2) of section 30 of the Excise Act was not in the nature of an exception within the meaning of section 105, Evidence Act, and it might have been expected that he would have given reasons for this opinion.

I have referred to the Indian Penal Code or instances of general and special exceptions, and I am unable to discriminate between them and the clause in question. It appears to me that this clause can only be interpreted as an exception. The offence of illegal possession of . . . fermented liquor is defined in the first clause as above noted, and then in the second clause we have a statement of special circumstances, in which possession so defined is not an offence; in other words, we have what section 105, Evidence Act, calls a special exception. Compare section 300, Indian Penal Code. We have there first a definition stating in what cases the offence of culpable homicide amounts to the offence of murder. Then in the (special) exceptions we have statements of special circumstances in which this definition does not hold good.

With due respect I am unable to concur in Mr. Justice Fox's statement of the law on the point in question.

As Messrs. Amir Ali and Woodroffe say in their Commentary to section 105, Evidence Act: This section is an important qualification of the genetal rule that in criminal trials the *onus* of proving everything essential to the establishment of the charge against the accused person lies upon the prosecution"

Mr. Justice Fox's reference to Europeans and Chinamen is, I think, fallacious. The law contained in section 105, Evidence Act, applies to all alike. But the distinction between one person in possession of liquor in excess of the ordinary authorized quantity, and another, lies in all the circumstances surrounding each. And the Excise authorities exercise a reasonable discretion is not calling upon persons to explain such possession, when no suspicion that the liquor

* Agabeg's B. L. R., Vol., XI, Pt. V, 227.

is intended for sale, exists. The same suspicion does not exist in all cases; *e.g.*, a Magistrate whether European or not, whose customs include the use of European wine or spirits at private entertainments, and who does not engage in any kind of trade, occupies a very different position from a small trader in miscellaneous goods, whether Chinaman or not, whose customs do not ordinarily include the use of such wine or spirits.

For these reasons I am of opinion that if the accused in the present case wished to seek the protection afforded by clause (2) of section 30 of the Act which contains the exception to the general rule stated in clause (1), it was for him to show that he was entitled to that protection. In other words the possession of more than 12 quarts of beer being *primâ facie* illegal, it was for the accused when charged with the illegal possession to prove that he purchased the beer for his private use and not for sale, and accused being a Burman in Upper Burma, it would be necessary for him to show that he purchased legally, otherwise his defence would avail him nothing.

As we have seen the accused made no attempt to prove the defence he set up which in it self was not one that would bring him within the exception. What he had to prove was not only that he had possession of the beer for his private use but that he purchased it (legally) for his private use

The learned Government Prosecutor who was instructed by the District Magistrate to argue the case has been unable to support the District Magistrate's view based on *Crown* v. *Lipyin*.

There being no reason for interfering with the conviction, the proceedings are returned.

Gambling—10, 11, 12.

Criminal Revision No. 5 of 1905. February 25th.

Before A. M. B. Irwin, Esq., C.S.I.

KING-EMPEROR *v.* NGA NET AND OTHERS.

A person who conducts gaming in a public street, or similar place, should be convicted under section 10 of the Burma Gambling Act.

The primary object of the Legislature was not to make the conduct of gambling in a public place punishable under section 12.

Reference:—

U. B. R., 1897-01, 217.

Card gambling and cock fighting were carried on under a tamarind tree near the village. Most of the accused were convicted of gambling and setting animals to fight in a public place, under section 10. Nga Net and Nga Po Ye were convicted on the same facts, with the additional fact that they acted as *daings*, and this was held to be an offence under section 12. According to the police report Nga Net was the *kyet daing* and Po Ye the *pe daing*.

In the finding the words of section 12 are not used, as they ought to be, nor was the definition of common gaming house referred to. The Magistrate ought to have carefully considered whether such a place as is described in the judgment can, under the circumstances described, be held to be a common gaming house.

Under section 3 a "common gaming house" includes a public place in which any instruments of gaming are kept or used for the profit or gain of the persons using such place. The expression "Instruments of gaming" is defined in sub-section (3), and does not include birds or animals. The decision in this case turns on the meaning of the word "public" in section 3(1). In the expression "owning, occupying, using or keeping." I think the four verbs must be construed as *ejusdem generis*, and if so, none of them can apply to a place which is public in the sense that the person charged with using it has no right of use which differs from the right of the public in general. There are many other places which are public in the ordinary meaning of the word, *e.g.*, a theatre, a Railway station, and a Court of law. I would say therefore that the word "using" in section 3, and the expression "having the use of" in section 12 denotes something different from the using of the public at large who resort to the place. The "using" in the second line of section 3 (1), clause (*a*), must be a general using distinct from the special using mentioned in the previous line, which converts the place into a common gaming house.

Moreover in this case the Magistrate made no distinction between the *kyet daing* and the *pe daing*. Even if the possession of cards could convert the space under the tamarind tree into a common

KING-EMPEROR v. NGA NET.

gaming house, the possession of cocks could not, because birds and animals are not mentioned in section 3 (3). This confirms the constuction I have placed on the definition of "public" as it can hardly be supposed that the Legislature intended that the person who organizes offences under clause (*a*) of section 10 for his own profit should be punishable under section 12, while a person who organizes offences under the other clauses of section 10 is not so punishable.

Taking a comprehensive view of the Act, sections 11 and 12 relate to offences committed in a common gaming house, section 10, to offences committed in a public place. Without going the length of saying that offences under sections 10 and 12 cannot be committed at the same time in the same place I think it may safely be said that the primary object of the Legislature was not to make the conductor of gambling in a public place punishable under section 12.

In *Po Tun* v. *King-Emperor* * my learned predecessor held that the promoters and organizers of gambling on a threshing floor should be convicted under section 10, not section 12, though the threshing floor was only a private place to which the public had access, not a public place in the same sense as a public street or the space under a tamarind tree outside the village in the present case.

I therefore alter the convictions of Nga Net and Po Ye to section 10. The sentences are confirmed.

* U. B. R., 1897-1901, 217.

96

Municipal 99, 100, 154.

Criminal Revision No. 298 of 1904, June 8th.

Before H. Adamson, Esq., C.S.I.

ALLY HOSSAIN *v.* KING-EMPEROR.

Mr. J. C. Chatterjee, for applicant.

Held,—that in a prosecution under sections 99, 100 and 154, Burma Municipal Act, for slaughtering an animal within the limits of a municipality in a place not licensed for that purpose, it is necessary for the prosecution to prove not only that the animal was slaughtered in such a place, but that it was slaughtered for sale of its flesh.

The applicant was convicted under section 154, Burma Municipal Act, of slaughtering an animal in contravention of sections 99 and 100 of the Act. Section 99 empowers the Committee to make bye-laws, and the bye-law which it is alleged was contravened is bye-law No. 1 under Municipal and Local Department Notification No. 27, dated 7th March 1900, and is as follows:—

"No building or land within municipal limits shall be used as a slaughter house, or for the slaughter of animals for the sale of their flesh without a license from the Municipal Committee."

Section 100 provides that the Committee may fix places for the slaughter of animals of any specified description for sale of their flesh and that when any such place has been fixed, no person shall at any other place slaughter for sale of its flesh any such animal.

Applicant was charged with having slaughtered a bullock in his house without the license of the Committee. The defence was that the bullock was slaughtered not for sale of its flesh but for a feast which the applicant was giving to his friends. No proof was brought by the prosecution that the bullock was slaughtered for sale of its flesh, but the Honorary Magistrates convicted the applicant, holding that it was indifferent whether the bullock was slaughtered for a feast, or for sale of its flesh.

Applicant appealed to the District Magistrate on the ground that the conviction was wrong because the bullock was not slaughtered for sale of its flesh. The District Magistrate ignored the point urged and sustained the conviction.

It is quite clear that both Courts erred. The mere killing of a bullock in a house does not constitute that house a slaughter-house. The prosecution have to prove not only that the bullock was slaughtered in a place not licensed for that purpose, but also that it was slaughtered for sale of its flesh. The only circumstances under which the slaughter of animals for purposes other than sale of flesh within a municipality can be prohibited, and rendered penal, are specified in

7

ALLY HOSSAIN v. KING-EMPEROR.

section 101. The District Magistrate may prohibit it by proclamation if it appears to him to be necessary for the preservation of the public peace, and if he has obtained the previous sanction of the Commissioner.

The conviction of the applicant Ally Hossain is set aside. The convictions of the other three accused Askar Ally, Manut Ally, and Mir Jan are also set aside. The fines paid will be refunded.

Municipal—92.

Before G. W. Shaw, Esq.

iminal Revision No. 443 of 1904, September 22nd.

MAUNG SEIN, APPLICANT *v.* MUNICIPAL COMMITTEE OF PAKOKKU, RESPONDENTS.

Mr. Tha Gwe for applicant. | Mr. C. G. S. Pillay for respondents.

Held—that "Re-build" or "Re-erect" does not include "Repair."

See Upper Burma Municipal Regulation—page 1.

Penal Code--71.

Before A. M. B. Irwin, Esq.

KING-EMPEROR *v.* NGA SAN DUN.

Criminal Revision No. 24 of 1904, January 29th.

Held—that distilling spirit and possessing the spirit obtained by such distillation are not distinct offences within the meaning of section 35, Code of Criminal Procedure, and a double sentence is prohibited by section 71, Penal Code.

Although under section 235 (1), Code of Criminal Procedure, separate convictions for the two offences are legal, yet it is neither necessary nor desirable to convict for possessing spirit when the manufacture is proved.

References:—
1 U. B. R., 92-96, p. 93.
1 L. B. R., p. 33 (1900).

Accused was convicted on his own plea of distilling spirt, section 45, and of having spirit in his possession, section 51, Excise Act. He was not asked whether he had any particular quantity of spirit in his possession, and on that ground alone the conviction is bad, for the possession of one reputed quart bottle of country spirit is not prohibited by section 30. He may have had more in his possession, but it is neither proved nor admitted that he had, and there is no finding that he had more than one quart bottle.

Apart from this consideration, it is expedient to consider whether the double sentence was legal, namely, fine Rs. 50 or one month rigorous imprisonment in default under section 45 and fine Rs. 30 or twenty-one days' rigorous imprisonment in default under section 51. It is in accordance with the ruling of Mr. Burgess in the case of *Queen-Empress* v. *Po Tu**, but since then the point has been considered by a Full Bench of the Lower Burma Chief Court in *Queen-Empress* v. *Aw Wa*,† and the decision is largely based on the illustration to the explanation to section 35, Code of Criminal Procedure, which had not been enacted at the time of Mr. Burgess' ruling. The conclusion arrived at by the four Judges in that case is very lucidly expressed by Mr. Justice Fox as follows:—

"The question of the legality of the double convictions appear to me to depend upon the provisions of section 235 of the Code of Criminal Procedure, that of the legality of the two sentences upon the provisions of section 35 of that Code and those of section 71 of the Indian Penal Code. The explanation and illustration added to section 35 of the Procedure Code of 1898 clear up what was doubtful in the previous Code, and now although under section 235 an accused may be charged with, tried, and convicted at one trial for any number of offences which he is alleged to have committed in one series of acts so connected together as to form the same transaction, yet if the offences are not distinct offences within the meaning of section 35 of the Code of Criminal Ptocedure, he may not be sentenced for more than one of the offences of which he has been found guilty.

* 1 U. B. R., 1892-96, p. 93.
† 1 L. B. R., p. 33 (1900).

KING-EMPEROR v. NGA SAN DUN. 1904.

In the present case as the facts proved leave no reasonable doubt that the country spirit found in the accused's possession was the produce of the still which was also in his possession, there was, in my judgment, no distinct offence of possession of country spirit within the meaning of section 35 of the Code of Criminal Procedure, and consequently the sentence for the offence under section 51 of she Excise Act was not legal and should be set aside."

It is necessary to examine whether the illustration to section 35 governs the present case. House-breaking is an offence under section 453, theft in a house is an offence under section 380. House-breaking with intent to commit theft is punishable under section 454. But this offence can be committed without actual theft: it is not the act of theft but the intention that aggravates the house-breaking and brings it under section 454. It cannot be said that the offence under section 454 is composed of a combination of two other offences. Therefore the illustration does not seem to apply to clause 3 of section 71. I think the true meaning of the illustration must be sought for in clause 2. The only way to bring it within the terms of section 71 is to take the term "anything" as meaning any one event or group of inseparably connected events in which each event which constitutes an offence is a natural and ordinary cause or consequence of some of the other events. The reasoning which Mr. Burgess applied to the Excise case would exclude house-breaking and theft from section 71 of the Penal Code, for each offence could be committed without committing the other, yet it is plain since 1898 that the Legislature intends that that combination of offences should be governed by section 71. The case of distilling and possessing spirit must equally if not *a fortiori* come within that section, for the production of more than one quart bottle of spirit is more nearly a necessary consequence of distilling than theft is of house-breaking with intent to commit theft.

I therefore think that the double sentence in this case would not be legal, even if the possession of more than one quart bottle of spirit had been admitted. The conviction under section 51 is illegal because there was no such admission nor proof. I may add that when manufacture is proved and evidence of illegal possession is forthcoming, it is, although legal, yet neither necessary nor desirable to refer to section 51 nor to record a separate conviction for possessing. The quantity of liquor manufactured should be taken into account in passing sentence under section 45.

The conviction and sentence under section 51 are set aside. The fine if paid will be refunded.

Penal Code—171.

Criminal Revision No. 995 of 1903. 11th January 1904.

Before A. M. B. Irwin, Esq.

KING-EMPEROR *v.* NGA PO KYAW.

The accused was found carrying a Police jacket under his arm with intent that it should be believed that he was a Police constable.

Held—that he had not committed an offence under section 171, Penal Code.

Reference:—1, Upper Burma Rulings, 1892—96, page 168.

The formal finding that accused "wore a garb," etc., is not consistent with the previous part of the judgment, in which the Magistrate had that accused was carrying the jacket under his arm with intent that it should be believed that he was a Police constable. This finding is clearly correct, but it is quite a different thing from wearing the jacket with a like intent. In other words the accused had made preparation for committing an offence, but preparation to commit an offence is not necessarily an offence. It does not amount to an attempt to commit an offence and it is not punishable unless made specially punishable as in the case of preparation to commit dacoity, section 399, Penal Code. The law allows a would-be criminal a *locus penitentiæ* and does not punish for mere intent or preparation to commit an offence until the intent or preparation developes into an overt act amounting to an attempt. The same principle underlies the decision of this Court in the case of *Queen-Empress* v. *Nga Pe alias G. H. Rogers*.* The distinction is clearly set forth in Chapter XV of Mayne's Criminal Law of of India.

There is no evidence that Po Kyaw wore the constable's jacket, and there is no evidence from which it can be inferred that he wore it.

The conviction and sentence are set aside. Po Kyaw will be released.

* 1, Upper Burma Rulings, 1892—96, page 168.

Penal Code—294.

Before A. M. B. Irwin, Esq.

Criminal Revision No. 910 of 1903. 25th January 1904.

KING-EMPEROR *v.* | 1. MI KUN YA. 2. MI EIN BYAUNG.

Mr. H. M. Lütter—Government Prosecutor—for the Crown.

A conviction under section 294, Penal Code, for uttering obscene abuse in a public place may amount to a conviction for an offence involving a breach of the peace within the meaning of section 106, Code of Criminal Procedure.

References:—

1, L. B. R., page 262.
2, L. B. R., page 125.
4, Bom. L. R., page 78.
I. L. R., 26 Cal., page 576 (1899).
I. L. R., 27 Cal., page 983 (1900).

Six residents of Hemamala quarter presented to the Magistrate a complaint to the effect that Ma Kun Ya and Ma Ein Byaung used foul and abusive language in the quarter every day without intermission to the annoyance of monks and men. Evidence was given of the commission of this offence on a specified day, and both women were convicted under section 294, Penal Code, the reasons for the finding being as follows:—

"There is ample evidence that both accused had been abusing each other in the quarter in a most filthy language. Accused Ma Kun Ya was twice convicted of the same offence."

Both were fined, and Ma Kun Ya was ordered to execute a bond for Rs. 20 to keep the peace for six months.

I have heard the learned Government Prosecutor on the question whether the offence of which Ma Kun Ya was convicted is an offence involving a breach of the peace, within the meaning of section 106, Code of Criminal Procedure.

In the case of *Crown* v. *Nga Wet Taung** I concurred with the learned Chief Judge of the Lower Burma Chief Court, in holding that an offence under section 504 does not involve a breach of the peace, and that a conviction under that section does not render the accused liable to be put on security under section 106, Code of Criminal Procedure.

Mr. Justice Birks, in *King-Emperor* v. *Ma Hla Bon* † held that ruling would equally apply to a conviction under section 294.

He remarked that—

"Obscene abuse does not necessarily involve a breach of the peace any more than abuse under section 504."

* 1, L. B. R., page 262.
† 2, L. B. R., page 125.

KING-EMPEROR v. MI KUN YA. 1904.

To my mind this consideration does not quite conclude the matter. An offence under section 504 may be committed anywhere; an offence under section 294 can only be committed in or near a public place and the essence of the offence is that it causes annoyance to others whether the accused intended to annoy them or not. It is at least arguable that a breach of the peace may be committed without actually coming to blows, and that acts which would not amount to a breach of the peace in private may amount to such in a public place.

In Ratan Lal's and Dhirajlal's Penal Code, second edition, page 470, is a note that it was held in the case of *Chunabhai* * that the public peace can be broken by angry words as well as by deeds. The full report of the case is unfortunately not available here. I have not been able to find any definition of the term "breach of the peace," and it is perhaps hardly susceptible of definition, but there seems nothing unreasonable or contrary to the plain meaning of the word "peace" in the view that the public peace can be broken by angry words.

Section 294 includes several distinct kinds of acts, and I am quite ready to agree with Mr Justice Birks that some of those acts do not involve a breach of the peace. But it may be doubted whether the act of uttering obscene abuse in a public place to the annoyance of others is not necessarily a breach of the peace.

However that may be, there is authority for the view that section 106 may be applicable on conviction of an offence of which a breach of the peace is not an essential element, if there is an express finding that the acts of the accused amounted to a breach of the peace, in the case of *Jab Lal Gir* v. *Jogmohan Gir* † and this principle was reaffirmed in *Sheo Brayan Singh* v. *Singh Mosawi* ‡ although the learned Judges in that case pointed out that difficulties of this kind arise from trying an accused person for a minor offence not necessarily involving a breach of peace when the acts proved constitute a graver offence which does include such a breach.

On full consideration I am of opinion that the acts of the accused as proved in this case did amount to a breach of the peace, and that she was convicted of an offence involving a breach of the peace. Considering the previous convictions, and the fact that her conduct gave so much annoyance as to drive her neighbours to complain to the Magistrate, the order to execute a bond was a proper one.

Let the proceedings be returned.

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* 4. Bom. L. R., page 78.

† I. L. R., 26 Cal. page 576 (1899).

‡ I. L. R., 27 Cal., page 983 (1900).

Penal Code—337.

Criminal Revision No. 105 of 1904. February 24th.

Before A. M. B. Irwin, Esq.

KING-EMPEROR *v.* NGA SHWE LU.

Section 337, Indian Penal Code, applies only to acts done without any criminal intent. Personal injury intentionally caused is neither a rash nor a negligent act.

References:—

1, U. B. R., 1897—1901, p. 314.
1, L. B. R., p. 259.

The charge framed by the Magistrate is that accused threw stones at complainant, pulled her hair and assaulted her, and thereby committed an offence punishable under sections 337 and 352. It would seem that the Magistrate considered the stone throwing to be an offence under section 337, and the act of pulling complainant's hair a separate offence under section 352. If this be so, he transgressed section 233, Code of Criminal Procedure, by joining two offences in one head of charge. If, on the other hand, he considered that there was only one offence he should have specified only one section in the charge.

The judgment is defective, and I cannot ascertain from it what facts the Magistrate considered proved. It does not specify the offence of which the accused is convicted, as required by section 367 (2), Code of Criminal Procedure. The finding is merely that an offence under section 337 is proved: nothing is said about section 352. The evidence is that accused threw several stones at the complainant, and one of them hit her on the forehead, causing a wound. Accused also pulled her hair. It is quite clear that no offence punishable under section 337 was committed. As my learned predecessor said in *Queen-Empress* v. *Nga Ni*:*

"Section 304-A does not apply to a case in which the act itself is unlawful and amounts to the voluntary commission of an offence against the person. Personal injury intentionally caused is neither a rash nor a negligent act."

These remarks apply equally to section 337. The two sections apply to offences of the same class, as set forth in a ruling of the High Court of Calcutta, quoted in *Crown* v. *Nga San Pe*†. When accused threw stones at complainant, and one of them wounded her, it is obvious that accused voluntarily caused hurt to her. I alter the conviction to one of voluntarily causing hurt, under section 323.

The sentence is confirmed.

* 1, U. B. R., 1897—1901, p. 314.
† 1, L. B. R., p. 259 (1902).

Penal Code—380.

Criminal Revision No. 959 of 1902. 16th Jany. 1904.

Before A. M. B. Irwin, Esq.

KING-EMPEROR *v.* { NAWTARA SINGH. NGA AUNG THA. KYAWA SINGH. NARAIN SINGH.

If the materials of a house are taken away dishonestly, the act is theft even though the house is left uncared for. Ownership and possession of immoveable property are not so easily separated as ownership and possession of moveable property.

In order to enable a Court to exercise the power conferred by section 562 of the Code of Criminal Procedure, it is not necessary that the offender should be young, that the offence should be trivial, and that there should be extenuating circumstances. The mention of these conditions and of the character and antecedents of the offender merely indicates generally considerations with regard to which the discretion of the Court should be exercised in dealing with first offenders who are convicted of any of the offences specified in the section.

References:—

1. Upper Burma Ruling, 1897—1901, p. 137—139.
2. Lower Burma Ruling, page 65 (1903).

The Deistrict Magistrate's Judgment in revision is as follows:—

"The Township Magistrate appears to have exhausted the possibility of error in procedure. The accused were examined and cross-examined; the latter is illegal and the examination was not in accordance with section 364. The final order was illegal and in my opinion the conviction is wrong.

The facts are quite clear: the Bombay-Burma Trading Corporation, or one of its employés has a house at Paungbyin; which is not occupied and is fast going to rack and ruin: there is a Durwan, but he admits that he has not been living there for some time and apparently contents himself with looking in at the place about once a month. The four accused went there and began taking posts and shutters for firewood, thinking that the house, being deserted, was no one's property and could be demolished at their pleasure. I think the offence committed is not theft, but mischief and misappropriation. The accused live at Paungbyin and are policemen. The conviction is altered to those sections, and the accused are fined Rs. 5 each or 7 days' rigorous imprisonment in default.

In my opinion the Township Magistrate is more logical than the District Magistrate.

If the accused in good faith believed that the house was no one's property there was no dishonesty in their act, and therefore, it was not criminal misappropriation. If they did not in good faith believe that the house was no one's property, I do not think the house ceased to be constructively in possession of the owner from the mere fact that the caretaker only visited it about once a month. Immoveable property is not subject to the same rules as moveable, in respect of constructive possession. A hut in a paddy-field might remain unoccupied and unvisited for several months after harvest, but it would not thereby cease to be in possession of the owner of the paddy-field who erected it. If the house was in possession of the owner the offence was theft.

As the Magistrate did not acquit the accused altogether, I presume that he really believed they had some dishonest intent. It does not seem necessary to interfere any further.

KING-EMPEROR v. NAWTARA SINGH. 1904.

The District Magistrate's strictures on the Township Magistrate's procedure are exaggerated. In the examination of the accused there seems to be little to object to except that they were asked whether they had previously been convicted. The final order which the District Magistrate considers illegal is as follows:—

"The accused are respectable young men, and in my opinion, should be considered as the children of honest parents. Although section 562 of the Code of Criminal Procedure does not apply, yet in such a petty case, of useless property, * * * * * I think it would be proper to pass orders under that section. As it is a first offence let them give their own recognizances for good behaviour for one year. Send them to the Subdivisional Magistrate.

The Township Magistrate certainly deserves censure for making an order which he himself expressly declared to be not in accordance with law, but the District Magistrate's remark seems to indicate that he also considered the order to be illegal, quite apart from the Myoôk's opinion of it. It is necessary to see whether it was illegal. The four accused were convicted of theft in a house, under section 380. Their ages are 33, 24, 30, and 22. It was an irregularity, no doubt, to take bonds for good behaviour in anticipation of the orders of the Subdivisional Magistrate, but the District Magistrate may also have considered the order illegal by reason of the ages of the accused, and in this respect the order is undoubtedly at variance with the ruling of Mr. Thirkell White in *Queen-Empress* v. *Nga San Chin*.* which was followed by Mr. Shaw in *King-Emperor* v. *Babuddin* † But the point has since been considered in the Lower Burma Chief Court by a full bench, of which Sir Herbert Thirkell White was a member, in the case of *King-Emperor* v. *Ba Han* ‡ and the learned Judges were unanimous in holding that the age of an offender is no bar to the application of section 562. The interpretation of the section which was approved by the Court is stated thus:—

"In order to give a Court jurisdiction to release an offender under section 562, Code of Criminal Procedure, there must co-exist two conditions precedent; there must be no previous conviction proved, and the offence must be one of those specified in the section. If those conditions are fulfilled, the Court has jurisdiction, in the exercise of its discretion, to act under the section. But in exercising its discretion, the Court must have regard to the points specified in the section, namely, to the youth, character, and antecedents of the offender, to the trivial nature of the offence, and to any extenuating circumstances under which the offence was committed. * * * * The intention of the Legislature is not to make it essential that the offender must be young, that the offence must be trivial, and that there must be extenuating circumstances, but merely to indicate the lines on which the discretion of the Court should be exercised."

I think this view is sound, and I agree with the learned Chief Judge, Sir Herbert Thirkell White, that his previous ruling in this Court was not correct. The order which the Township Magistrate proposed to the Subdivisional Magistrate to make, would therefore be legal. It does not appear that the Subdivisional Magistrate ever passed final orders in the case. When the case was resubmitted to him after the further inquiry which he had ordered, he was absent from headquarters, and the record seems then to have found its way to the District Magistrate

* U. B., R., 1897—1901, p. 137. † U. B. R., 1897—1901, p. 139.
‡ 2, L. B. R., p. 65 (1903.)

110

Penal Code—323, 379, 114.

Criminal Revision No. 64 of 1904, 8th April 1904.

Before A. M. B. Irwin, Esq.

KING-EMPEROR *v.* NGA TOK GYI.

Mr. H. M. Lütter, Government Prosecutor, for the Crown.

The accused was tried and convicted at one trial of causing hurt and of abetment of theft at a different place on the same day. The Sessions Judge on appeal noticed that the two offences ought not to have been tried together but considered that the error was cured by section XV of the Schedule to the Upper Burma Criminal Justice Regulation.

Held—that the trial of the offences together was an illegality which is not curable either by the Criminal Justice Regulation or any other provision of law.

References :—

Upper Burma Rulings, 1904, Criminal Procedure, page

Nga Tok Gyi was tried and convicted at one trial of causing hurt about 1 P. M. on 4th February, and of abetment of theft at a different place about 9 P.M on the same day. The two offences were perfectly distinct and one had no connection with the other. The learned Sessions Judge on appeal noticed that the two offences ought not to have been tried together, but he considered that the error was cured by section XV of the Schedule to the Upper Burma Criminal Justice Regulation.

I have recently, in the case of *King-Emperor* v. *Asgar Ali** held that under the ruling of the Privy Council in *Subramania Ayyar* v. *King-Emperor*† a misjoinder of charges is an illegality and not cured by section 537, Code of Criminal Procedure. In that case my attention was not drawn to section XV of the Schedule to the Upper Burma Criminal Justice Regulation. I have now had the advantage of hearing the learned Government Prosecutor on the point whether that section cures the error which is not cured by section 537, Code of Criminal Procedure.

The language of section XV is very similar to that of section 537. The main difference seems to consist in the omission from the former of the words "Subject to the provisions hereinbefore contained." The effect of section XV would therefore seem to be to cure some defects which are declared to be fatal defects in some section of the Code preceding section 537. It is not necessary to inquire now what those defects are, for the particular illegality now in question is one that is not expressly provided for in any section of Chapter XLV of the Code. Before 1901 it was thought by some High Courts that misjoinder was curable by section 537. The Privy Council have decided that section 537 does not apply because the error is not a mere irregularity but an illegality. Section XV also covers only irregularities which are not illegalities. It goes no further in this respect than does section 537.

* U. B. Rulings 1904, Criminal Procedure, page

† I. L. R. 25 Mad. 61 (1901).

KING-EMPEROR v. NGA TOK GYI. 1904

In other words it only modifies the Code of Criminal Procedure, whereas the ruling of the Privy Council is outside of and independent of the Code in deciding the legal effect of disregard of a direction contained in the Code.

I therefore find that the trial of the two offences together was an illegality which is not curable either by the Criminal Justice Regulation or otherwise. I set aside the convictions and sentences and direct that the accused be retried at two separate trials.

Penal Code—59.

Before A. M. B. Irwin, Esq., C.S.I.

NGA MEIK *v.* KING-EMPEROR.

Criminal Appeal No. 150 of 1904. January 17th, 1905.

A sentence of transportation for seven years in lieu of two sentences of imprisonment amounting, when combined, to seven years is not legal.

References :—

U. B. R., 1897-1901, 144.
8 W. R., 2 (1867).

The Appellant pleaded guilty to the substantive charges and admitted the previous convictions. My learned predecessor probably admitted the appeal for the purpose of considering the sentence of transportation. Appellant was convicted of two acts of criminal breach of trust, both under section 406. The District Magistrate sentenced him on the first charge to four years' rigorous imprisonment and on the second charge to three years' rigorous imprisonment. Then, under section 59, Penal Code, he directed that in lieu of the sentences of imprisonment the Appellant should suffer transportation for seven years. In *Nga Shwe Hman* v. *Queen-Empress* * it was held by this Court that there is no warrant in the Penal Code or the Code of Criminal Procedure for passing a sentence of imprisonment and then commuting it to transportation. The sentence of transportation should be passed directly. If that were done in the present case there would be two sentences of transportation each less than seven years. It was held by the High Court of Calcutta in *Queen* v. *Gour Chunder Roy* † that this is not legal. The words "in every case" in section 59 were construed as meaning "on any charge" or "for any offence." I do not know that this has ever been overruled or dissented from, and I see no reason to dissent from it. I reverse so much of the Magistrate's order as refers to the commutation of the sentences of imprisonment. The result will be that Appellant will suffer seven years' rigorous imprisonment instead of seven years' transportation.

* U. B. R., 1897-1901, 144. | † 8 W. R., 2 (1867).

Penal Code—182.

Before A. M. B. Irwin, Esq., C.S.I.

Criminal Revision No. 996 of 1904. December 31st.

KING-EMPEROR *v.* NGA AUNG PO.

Held,—that giving false answers to questions put by a Police Officer in the course of investigation of a cognizable offence is not punishable under section 182, Penal Code.

Reference:—

1 L.B.R., 101.

In the course of an investigation of a case of dacoity Nga Aung Po was examined as a witness by a Police Officer. Some articles were shown him which he said he could not identify, but when pressed by the Police Officer he did identify them. When examined by the Magistrate he said that he could not identify them and that he had made the contrary statement to the Police to avoid being detained longer.

On this admission he has been convicted of giving false information to a public servant, an offence punishable under section 182, Penal Code.

I do not think the facts found constitute an offence under section 182. The plain ordinary meaning of the expression "give information" is to volunteer information, not to make statements in answer to questions put by the public servant, and it would be importing into the section a meaning which cannot be presumed to have been contemplated by the Legislature, to say that the section covers such statements.

Persons examined by the Police are not bound by law to speak the truth, and therefore cannot be punished under section 193 for making false statements to the Police. If the accused Aung Po had been legally bound to speak the truth, it is evident that he would have been prosecuted for giving false evidence, and it seems to be a mere evasion of the law to make him liable under section 182. It is true that in *The Crown* v. *Mi Zan*,* Mr. Copleston, Chief Judge of the Lower Burma Chief Court, seemed to imply that a person might be convicted under section 182 for giving false information in the course of a police investigation, because the reason for which he refused to order further inquiry was that there was no suggestion that it could be proved which statement was false, the statement made to the police or the statement made on oath before the Magistrate. He merely held that the accused could not be convicted in the alternative under section 182 or section 193. But he did not expressly rule that a conviction under section 182 could be sustained if the statement made to the Police

* 1 L. B. R., 101.

* Penal Code—363, 366.

Criminal Revision No. 86 of 1905, March 13th.

Before A. M. B. Irwin, Esq., C.S.I.

KING-EMPEROR *v.* NGA NGÈ.

Section 366 of the Penal Code is not applicable where a girl at the time of the kidnapping from lawful guardianship intends to cohabit of her own free will with the kidnapper.

References:—

U. B. R., 1897—1901, 328 (overruled).
————, 1903, Penal Code, 15.
1 L. B. R., 297 (followed).

Nga Ngè, a married man, aged 29, eloped with Mi E Kin, a girl of 13 years and 4 months, who lived with her parents next door but one to Nga Ngè. The girl said she went because he promised her clothes, not because she loved him. They cohabited for two days before the girl's father traced and found them. It seems to be taken for granted by the Magistrate that the girl, when consenting to elope, did so with the intention of having sexual intercourse with the accused, and there is no suggestion to the contrary on the record. The Magistrate charged and convicted the accused of simple kidnapping under section 363. He entirely ignored the question whether Nga Ngè committed the offence in order, or knowing it to be likely, that the girl might be seduced to illicit intercourse. If there was such intention or knowledge the offence would be punishable under section 366 and the Magistrate would have no jurisdiction to try it.

There are two published rulings of this Court, *viz.*, *King-Emperor* v. *Nga Po Saw* (*) and *King-Emperor* v. *Nga Ni Ta*, (†) in which it was held that facts as found in the present case constitute an offence under section 366. It is the duty of every Magistrate to read the rulings of this Court when they are published and to follow them when occasion arises.

At the same time, with great respect to my learned predecessors, I am unable to assent to their interpretation of section 366. In the case of *Nga Ni Ta* Mr. Adamson examined the judgment of the Chief Court of Lower Burma in *Crown* v. *Nga Chan Mya* (‡). I do not think it necessary to discuss Mr. Adamson's criticism of the remarks of the Chief Court on the questions of marriage and illicit intercourse, as they are not essential to the decision. On the material point Mr. Adamson agrees with the Chief Court that an essential part of an offence under section 366 is an intention to seduce subsequent to elopement, but he holds that cohabitation without marriage is proof

(*) U. B. R., 1897—1901, 328.
(†) ————1903, Penal Code, 15.
(‡) 1 L. B. R. 297.

* Dissented from in 3 Rang 455 (at pp 461)

119

KING-EMPEROR v. NGA NOE.

of seduction subsequent to elopement and of intention at the time of elopement to seduce subsequently. The Chief Court did not hold, as Mr. Adamson seemed to think, that there could be no further seduction because the girl had once surrendered her chastity before elopement; on the contrary, it was assumed in the order of reference that seduction had not reached its consummation in actual sexual intercourse until after the elopement. What the Chief Court held was that if before elopement the girl consented to cohabitation after elopement, then the seduction was effected before elopement and therefore an intention to seduce subsequently cannot be presumed.

Under section 363 imprisonment which may extend to seven years is the punishment for kidnapping. The extra three years prescribed by section 366 are most appropriate for the intention to bring force or persuasion to bear on the girl after she has been removed from the shelter of her home and deprived of the support which her guardian's presence would give her in resisting either threats or enticements. If the legislature intended that the offender should be liable to the higher punishment in every case in which he intended that the girl should have illicit intercourse with some man, it would be easy to say so in plain terms. In my opinion it is contrary to the well-known rule of construction of penal statutes to say that an intention to seduce to illicit intercourse can be presumed when the girl has already consented to illicit intercourse.

There is therefore no reason to interfere in the present case. The sentence of one year's rigorous imprisonment and a fine is appropriate.

120

Penal Code—406.

Criminal Revision No. 1078 of 1904.

January 25th, 1905.

Before A. M. B. Irwin, Esq., C.S.I.

NGA THA ZAN *v.* KING-EMPEROR.

Mr. *Tha Gywe*—for Applicant.

Mere retention of money does not necessarily raise a presumption of dishonest misappropriation to one's own use, but dishonest misappropriation may sometimes be inferred from the circumstances without direct evidence.

References:—

I. L. R., 9 All., 666.
——— 10 Bom., 256.
U. B. R., 1897—1901, 345.

MAUNG THA ZAN was a village headman. He was ordered to collect plantain trees which were required by Government to plant in another district. They were to be paid for at Rs. 15 per hundred, and certain moneys were paid to Tha Zan to give to the owners of the trees. This went on for three successive years and the sums, which accused Tha Zan received from Government to pay to the owners of the trees, were not paid to them. He admits that he has Rs. 13-8-0 of this money in hand, after paying cart hire and boat hire. He also compelled persons who could not supply plantain trees to pay a few annas each instead of trees.

He was convicted of criminal breach of trust and sentenced to 35 days' rigorous imprisonment. His appeal was dismissed by the Court of Session.

I am asked to reverse the conviction because there is no evidence of dishonest disposal of the money. *Nga Hmu* v. *King-Emperor** is cited in support of this. My learned predecessor said it had been repeatedly held by the Indian High Courts that it is not sufficient to show that money had been retained: it must also be shown that the accused disposed of it in some way other than that in which he was bound to apply it and that he did so dishonestly. None of the decisions of the Indian High Courts were cited in that judgment. In the present case two are cited, namely, *Queen-Empress* v. *Murphy* † and *Queen-Empress* v. *Ganpat Tapidas*.‡ The former is of no assistance here. In the latter a patel received from Government small sums of money to pay to villagers. He took receipts from the villagers and sent them to the Collector but did not pay the money to the payees. These persons had not made any criminal complaint, and said they did not think the patel would cheat them. The High Court reversed the conviction, apparently because the payees were willing to trust the patel,

* U. B. R., 1897—1901, 345.
† I. L. R., 9 All., 666.
‡ ———10 Bom., 256.

NGA THA ZAN v. KING-EMPEROR.

and because he had never repudiated the debts, and so far as Government was concerned he had fulfilled the trust reposed in him by forwarding the receipts. This last reason I cannot endorse ; I think that so far from fulfilling the trust reposed in him he tried to deceive the Collector by submitting false evidence of payment.

I agree with my learned predecessor that mere retention of money does not necessarily raise a presumption of dishonest misappropriation to one's own use, but I think that dishonest misappropriation may sometimes be inferred from the circumstances, without direct evidence. In the case of money it is obvious that to constitute misappropriation it is not necessary that the identical coins received should be spent in buying something for the accused's own use. In 99 cases out of 100 the money when received would be mixed with the accused's own money, and the actual misappropriation would be a matter of intent only. The honest man would pay the sums to the proper recipient out of the mixed sum in his purse or in his bank, while the dishonest one would simply form in his own mind the intention of not paying it.

The Courts have no means of ascertaining a man's intentions except from his acts. The mere neglect to pay out sums received for three or four months would perhaps in most cases be insufficient to raise a presumption of dishonest intent to retain the money permanently ; but in the present case the *thugyi* retained some of the money for three years, and I cannot say that the Courts below were wrong in regarding this as raising a presumption of dishonest intent, when coupled with the fact that he illegally levied payment from those who could not supply trees. This levy seems to me to distinctly indicate an intention of not paying for the trees which were supplied. Over 40 witnesses were examined. Of these, one said the *thugyi* had asked him would he take the money due to him, something less than a rupee, and he replied that he did not want it as it would enrich neither of them. This is not sufficient to rebut the general presumption raised that the *thugyi* did not intend to pay. Two other witnesses knew that the *thugyi* had received money from Government but did not ask for it. This I think is immaterial. Their neglect to demand it would not affect the *thugyi's* dishonest intent to retain it.

For these reasons I dismiss the application, and direct that Maung Tha Zan, if he has been released on bail, be re-arrested and committed to prison for the remainder of his sentence.

Penal Code—141, 143.

Criminal Revision No. 185 of 1905. June 12th.

Before G. W. Shaw, Esq.

NGA KYAW YAUNG *v.* KING-EMPEROR.

Mr. *H. Broadbent*—Advocate for Applicant.

A headman and 18 villagers conducted a funeral procession along a public road with the object of vindicating their right to use the road and intending to resist obstruction. It was not proved that the party was armed, but some of its members used threatening language.

Held,—that the use of threats made the funeral party an unlawful assembly.

References:—

I. L. R., 20 All., 459.
——— 14 Bom., 441.
——— 3 Cal., 573.
———16 Cal., 206 (followed).
———21 Cal., 392.
———24 Cal., 686.
———26 Cal., 574.
———14 Mad, page 126.
U. B. R., 1897—01, I, 259 (followed).

Applicant Kyaw Yaung, the headman of Kanbayat, and 18 of his villagers have been convicted under section 143, Indian Penal Code, and sentenced to pay a fine of Rs. 10 each, or in default to suffer seven days' rigorous imprisonment.

They conducted a funeral procession from Kanbayat to the burial-ground at Teinnè, which is made use of by both villages. In doing so they went along the main road, which passes within the boundary of the inhabited site of Teinnè before reaching the burial-ground. The Teinnè people objected to dead bodies being brought in close proximity to the eastern face of their village-site, and wished the Kanbayat people to take their funeral processions along a diversion from the main road, which runs outside the boundary of the village-site.

There had been dispute between the villages about this for some years. On the occasion in question the applicant at the head of his funeral procession insisted on keeping to the main road in spite of the protest of the Teinnè people. Witnesses belonging to Teinnè swear that applicant in answer to the protest said he would go on his way by force if necessary, and also that the men in the procession were armed with *das* and sticks, and used threats and abusive language. As to the weapons, I think the Magistrate who tried the case was right in his conclusion that there had been exaggeration. The Monk U Paduma, who appeared to be a reliable witness, saw no weapons but the few *damas* and forks required for use in the burial-ground. The threats and abusive language did not amount to much either. All the Teinnè witnesses can say is, that they were called sons of whores, and told they would get the *da*, and have their funerals at the same time with this.

Penal Code—141, 143.

NGA KYAW VAUNG v. KING-EMPEROR.

one: and some allowance should probably be made for exaggeration here too. But the fact remains that threats were used. The monk admits this. The Magistrate who tried the case thought that an offence under section 143, Indian Penal Code, had been committed because the common object of the accused was to carry the dead body to the grave by force, or show of force, along a road by which they had no right to go. The error which he fell into was in supposing that applicant and his villagers had no right to go along this road. The fact that the people of Teinnè disliked funerals from Kanbayat taking this road, did not deprive the villagers of Kanbayat of the right of using the road. On appeal, the District Magistrate took another view. He thought that the idea of wounding superstitious sensibilities might be dismissed, and that there was no reason at all why the Kanbayat people should not have followed the public road. But he considered that they constituted an unlawful assembly within the meaning of section 141 (*4*) because "they were unnecessarily equipped with weapons and used much unnecessary abuse." Apparently what the District Magistrate meant was that some common object, falling within clause (*4*) of section 141, Indian Penal Code, might be inferred from the carrying of weapons and the use of abusive language, but he does not say what he conceived the common object to be, and as we have seen, it was not clear that the applicant's party were armed, nor was there very much abusive language.

What I think the common object of the Kanbayat people is shown to have been, was to take their funeral procession to the burial-ground by the main road by way of asserting their right to do so, and, in the event of the villagers of Teinnè trying to prevent them, to resist interference by force, if necessary, and it is certain that they, or some among them, used threatening words.

If this amounted to enforcing a right or supposed right by means of criminal force, or show of criminal force then there was an unlawful assembly.

The matter is not so simple as it appears at first sight on a perusal of the words of the section, or of the extract from Dalton's Justice of the Peace given in *Ismail and others* v. *Queen-Empress* * from *Ganauri Lal Das* v. *Queen-Empress*.†

I have referred to the following cases:— *Queen-Empress* v. *Raj Kumar Singh and others* ‡ (*1878*), *Ganauri Lal Das* v. *Queen-Empress* (*1889*), † *Queen-Empress* v. *Narsingh Patabhai* § (*1889*), *Queen-Empress* v. *Tirapadu* ‖ (*1891*), *Moher Sheikh* v. *Queen-Empress* ¶ (*1893*), *Pach Kauri and another* v. *Queen-Empress*,** (*1897*), *Anant Pandit* v. *Madhusudan Mandal*,†† (*1899*), *Queen-Empress* v. *Prag Dat and others* ‡‡ (*1898*).

* U. B. R., 1897—01, I, 259.
† I. L. R., 16 Cal., 206.
‡ I. L. R., 3, Cal., 573.
§ I. L. R., 14 Bom., 441.
‖ I. L. R., 14 Mad., 126.
¶ I. L. R., 21 Cal., 392.
** I. L. R., 24 Cal., 686.
†† I. L. R., 26 Cal., 574.
‡‡ I. L. R., 20 All., 459.

Penal Code—141, 143.

NGA KYAW VAUNG v. KING-EMPEROR.

None of the cases is precisely like the present one, and they are not all in agreement. But the principle which underlies them appears to be that unless the right of private defence arises, the enforcement of a right by more than five persons by force or show of criminal force, comes within section 141, Indian Penal Code. The view taken of the law in *Ganauri Lal Das* v. *Queen Empress* was upheld in the latest Calcutta case, *Anant Pandit's* case, and I think that I ought to follow it, as indeed my learned predecessor did in *Ismail* v. *Queen-Empress* above cited. In *Ganauri Lal Das's* case the vindication of a right of way when interrupted by force is referred to, and is asserted to be the enforcement of a right, and if done by five or more to be in many, if not in most cases, forbidden by law, and the point is taken that the right of private defence is only conferred by the Indian Penal Code against specified offences under the Indian Penal Code.

Here applicant's party were probably not in excessive numbers for the purpose of a funeral procession, and as we have seen, it is not proved that they were armed with more than the few weapons or implements required at the burial-ground, and they had a perfect right to go along the road which they took. Hence if they had simply taken their procession along, whether with or without the express object to vindicating their right of way, without uttering threats, they would not have constituted an unlawful assembly, and if the Peinnè people had wrongfully restrained them within the meaning of section 339, Indian Penal Code, they would have been protected by sections 97 and 101, Indian Penal Code, in offering resistance within the limits laid down in the last mentioned section. But as we have seen, applicant's party or some of them uttered threats, and on the principle laid down in the English legal authorities, this made them an unlawful assembly "whether the end and object they proposed were a just and legitimate one or not."

In these circumstances the convictions were right, and as the sentences were appropriate, there is no cause for interference.

The application is dismissed.

Penal Code, 425-429—Mischief.

Before G. W. Shaw, Esquire.

NARAIAN SINGH *v.* KING-EMPEROR.

Criminal Revision No. 521 of 1905. September 7th.

Mr. *S. Mukerjee*—for Applicant.

Intention to cause wrongful loss or damage, or knowledge that such loss or damage is likely to be caused—an essential element in the offence—maiming.

References:—
25, Weekly Reporter, Cri. 69.
Weir's Criminal Law, page 300.

The applicant has been convicted under section 429, Indian Penal Code, and sentenced to pay a fine of Rs. 30 or in default to suffer three months' rigorous imprisonment. The Magistrate found on the evidence that in order to drive a bullock away from his cow-shed he threw a stick at it, which hit and blinded one of its eyes. There is no reasonable doubt that applicant threw a stick and wounded the bullock in the eye. But it was not definitely shown that the eye was blinded. The bullock was still under treatment, and although the owner thought that the sight of the eye would prove to have been destroyed, he might have been mistaken.

"Maiming" originally meant the deprivation of a member proper for defence in fight (see Wharton's Law Lexicon *S. V.* Mayhem *Mathemium*). It has since acquired a wider meaning. But no doubt the decisions of the Punjab High Court referred to in the commentaries are correct in holding that as used in sections 428 and 429, Indian Penal Code, it means the privation of the use of a limb or member, and implies a permanent injury. In these circumstances section 429 did not apply to the present case.

If this were the only mistake there would be no cause for interference, since the punishment awarded might have been awarded under section 426.

There was however a more serious error. In order to constitute the offence of mischief it is necessary that the accused person should either intend to cause or know that he is likely to cause wrongful loss or damage (section 425). Now there is nothing to show what kind of stick applicant used, and this being so it cannot be assumed that he knew he was likely to cause wrongful loss or damage by throwing it at the bullock. It is probably a common practice to throw small sticks at cattle in order to drive them, and usually no harm is done. The chance of injuring an eye must be remote. If it had been proved that applicant threw a heavy stick which would be likely to injure the animal, he would have been rightly convicted of mischief. But as the case stands a conviction cannot be sustained. It has not been suggested that applicant intended to cause wrongful loss or damage. There is nothing on the record to indicate such an intention. The interpretation which I have given to the definition of mischief is no new one. It was given in *Pran Nath Shah* v. *Roma Nath Banerji** by the Calcutta High Court in 1876 and by the Madras High Court in the case referred to at page 300 of Weir's Criminal Law, in 1881, to mention only two decisions.

The conviction and sentence are set aside. The fine is to be refunded.

* 25 Weekly Reporter, Cri. 69.

Penal Code—318.

Before G. W. Shaw, Esq.

Criminal Revision No. 1130 of 1905. December 22nd.

KING-EMPEROR *v.* MI PYO NYO.

The offence punished by section 318, Indian Penal Code, cannot be committed unless the child has reached such a stage of maturity at the time of birth that it might have been a living child.

References:—

Mayne's Criminal Law, 2nd Edition, paragraph 467.
Lyon's Medical Jurisprudence, 2nd Edition, pages 280—285.

The accused Mi Pyo Nyo has been convicted and sentenced to pay a fine of Rs. 20 or suffer one month's rigorous imprisonment under section 318, Indian Penal Code, on a charge of secretly disposing of a child's body and thereby concealing the birth of the child. The Magistrate ought to have recorded admissible evidence to connect the accused with the child before calling upon her for explanation or charging her. Mi So's statement "I heard that the child was Mi Pyo Nyo's child," was not admissible under section 60, Evidence Act. There was apparently evidence which was directly to the point that the Magistrate might have taken.

But it is clear from Mi So's evidence that the child was not mature. It was nothing but a *fœtus* that could not have lived. Mi So says it was about a span long. This agrees with accused's statement that it was a *fœtus* of four or five months (*see* Lyon's Medical Jurisprudence, 2nd Edition, pages 280—285).

The case referred to in Mayne's commentary on the Criminal Law of India, 2nd Edition, paragraph 467, and cited in the order of reference is an authority for holding that the offence punished by section 318, Indian Penal Code, cannot be committed unless the child has reached such a stage of maturity at the time of birth that it might have been a living child.

As there was no proof of this in the present case the conviction cannot be sustained.

Apart from this it was not shown that there was a secret disposition of the child's body (*see* Mayne *in loc. cit.*, paragraph 468). It was merely left in a public place where it would be found by people not looking for it.

The conviction and sentence are set aside. The fine is to be refunded.

9

Penal Code—225B.

Criminal Revision No. 474 of 1906. June 8th.

Before G. W. Shaw, Esq.

KING-EMPEROR *v.* { GUN PAL. / ME YA.

The accused, seeing a process-server accompanied by the decree-holder and an elder coming with a warrant to arrest him in execution of decree, ran into his house and would not come out when called upon to do so.

Held—that this did not amount to resistance or illegal obstruction within the meaning of section 225B, Indian Penal Code.

A warrant for the arrest of the accused Gun Pal was issued by the Township Court in execution of a decree. A process-server went to his house with the warrant, accompained by the decree-holder and an elder in order to make the arrest. Gun Pal, seeing the party approach, ran into his house and did not come out when called.

The other accused Me Ya, his wife, stood in the doorway and forbade the process-server to enter, giving him to understand by her words and gestures that she would use force to prevent him. The process-server and his party therefore retired.

Both the accused were tried and convicted under section 225B, Indian Penal Code, on the charge of intentionally offering resistance or illegal obstruction to the lawful apprehension of Gun Pal. The District Magistrate has referred the case for orders, being of opinion that Gun Pal was not guilty of an offence in evading arrest in the way he did. The Law Reports furnish no instance of the kind, but I have no difficulty in concurring with the District Magistrate.

The language of the section is plain and free from ambiguity. Gun Pal offered no resistance or illegal obstruction. All he did was to go into his house and stay there, which he was perfectly at liberty to do. He was under no obligation to wait for the arresting party when he saw them coming, or to go out of the house to be arrested when they called him. The warrant was not addressed to him. There is nothing to show that the woman acted at his suggestion.

I set aside the conviction and sentence in the case of Gun Pal. The imprisonment has unfortunately been already undergone.

Penal Code—376.

Criminal Appeal No. 101 of 1905. April 5th, 1906.

Before G. W. Shaw, Esq.

NGA HLWA *v.* KING-EMPEROR.

Mr. Lütter, Government Prosecutor, for the Crown.

The accused was charged with ravishing a child of 4, who was unable to give evidence. The injuries received by the child might have been caused by any accident.

Evidence was offered of statements made by the child (1) to her grandmother immediately after receiving the injuries, (2) to the headman, later when examined by him.

Held—that the statement to the grandmother was the only statement that could possibly be proved (under section 8, Evidence Act), and that the grandmother's evidence as to that statement was insufficient to support a conviction.

References:—

Amir Ali and Woodroffe's Commentaries on the Evidence Act, 2nd Edition, page 59.

Mayne's Commentary on the Criminal Law of India, 3rd Edition, paragraph 491.

Appellant Nga Hlwa, a man of 61, has been convicted under section 376, Indian Penal Code, and sentenced to seven years' transportation for having committed rape on Mi Hla, a girl of 4 years of age, on the 16th July last. Appellant met the child in the jungle with her grandmother Mi Gyan, and took her away to give her honey. Later on he carried her home. She was then found to have sustained some injury to her private parts. * * * * But the District Magistrate omitted to ascertain whether such injuries could have been caused in any other way than by rape or an attempt to ravish. The District Magistrate also admitted evidence of what the child said to her grandmother and others. But as she was quite unable to give any evidence of any offence having been committed, indeed the only thing she said in Court was that appellant had done nothing to her, it depended on circumstances whether such evidence was admissible under either section 6 or section 8 of the Evidence Act. There is no other provision of the Evidence Act under which it could be admitted.

It was necessary in these circumstances to remand the case for further evidence to be taken. This additional evidence shows that the child's injuries might have been caused by any accident and afforded no conclusive evidence of rape or an attempt to ravish. On the contrary the Civil Surgeon gives it as his opinion that if rape had been committed or seriously attempted the injuries would have been much more serious.

With regard to section 6, Evidence Act, Amir Ali and Woodroffe in their Commentaries (2nd Edition, page 59) explain that sayings to be relevant as parts of a transaction "must be necessary incidents of the litigated act in the sense that they are part of the immediate preparations for or emanations of such act and are not produced by the calculated policy of the actors". "They are the act talking for itself, not what people say when talking about the act." "Whenever recollection comes in, whenever there is opportunity for reflection and explanations—then statements cease to be part of the *res geste*.

NGA HLWA
v.
KING-EMPEROR.

So under section 8, "The Evidence Act makes 'those statements admissible which are the essential complement of acts done or refused to be done, so that the act itself or the omission to act acquires a special significance as a ground for inference with respect to the issues in the case under trial.'" "A distinction is to be marked between a bare *statement* of the fact of rape . . . and a complaint. The latter evidences conduct; the former has no such tendency. There may sometimes be a difficulty in discriminating between a statemen and a complaint. It is conceived that the essential difference between the two is that the latter is made with a view to redress or punishment, and must be made to some one in authority,—the police for instance, or a parent, or some other person to whom the complainant was justly entitled to look for assistance and protection."

The evidence is that when the child got home and the appellant had gone away, she said to her grandmother that she had been hurt, and when asked where, she said Ba Hlwa had ravished her. She was crying when she said this The grandmother examined the child's parts and found them covered with blood, then went to the headman and reported, and the headman questioned the child, asking her on the first occasion whether Maung Hlwa had ravished her to which sh replied yes, and on the second whether Maung Hlwa had not ravished her to which she replied no. She was not crying when examined by the headman. It appears to me that none of these statements is relevant under section 6 in view of the explanation above given, and tha only the statement to the grandmother can possibly be proved under section 8 as a complaint.

And with regard to that statement we have only the evidence of the grandmother whose *bonâ fides* the appellant questions Assuming the grandmother to be speaking the truth, and that the child spoke without prompting or suggestion, and actually used the word, we have no means of knowing whether the child understood what ravishing meant. The exact word she is said to have used is the vulgar Burmese word: * .But it is impossible, I think, to assume that a Burmese child of 4 knows what that means.

The whole case against appellant rests on this evidence of the grandmother.

As Mayne says (Commentary on the Criminal Law of India, 3rd Edition, paragraph 491) "In the majority of cases the only direct evidence of the rape is that of the prosecutrix herself. When that breaks down or cannot be obtained, as where the female from extreme youth, or from some incapacity, such as being deaf and dumb, cannot give her testimony and there is no other evidence producible, there is nothing for it but to acquit".

* * * * * * * If the medical evidence had been that the injuries could only have been caused by rape or an attempt to ravish, there would have been some evidence against appellant besides the statement of Mi Gyan as to the child's complaint to her. As it is there is nothing but that statement, and I am of opinion that it is insufficient to support a conviction.

For these reasons I set aside the conviction and sentence and direct that the appellant be acquitted and released.

134

Penal Code—299-300.

Criminal Appeal No. 50 of 1906. August 7th.

Before G. W. Shaw, Esq.

NGA NA BAN *vs.* KING-EMPEROR.

Culpable homicide—Murder.

Held—that the last clause of section 299 and the 4th clause of section 300, Indian Penal Code, do not apply to cases where bodily injury is intentionally caused.

Held also—that in the case of a blow with a stick, the question whether the intention was merely to cause bodily injury likely to cause death, or to cause bodily injury sufficient in the ordinary course of nature to cause death is one of degree of probability, and depends generally on the character of the weapon and the way it was used

References:—

U. B. R., 1892—96, I, 215. | 3 L. B. R., 122.
———, 1897—190, I, 282. | 2 ———, 125.
S. J. L. B., 508. | I. L. R., 1 Bom., 342.

Appellant Na Ban, aged 22, has been convicted under section 302, Indian Penal Code, of murder and sentenced to transportation for life with respect to the death of one Nga Hmat on the 1st March last at Yamèthin.

The facts are not disputed. The sole question is what offence was committed.

Deceased, who was a bully and a man of bad temper, had abused and assaulted appellant's mother and sister about midday. At about 6-30 P.M. appellant who had been drinking *tari*, but was not drunk, found deceased playing football, and after looking on for a short while, went and got a billet of firewood from a house near by, and without saying a word approached deceased from behind and struck him once with the billet on the head, and then ran away.

The blow fractured the skull and caused death some two hours later. The medical evidence is that considerable but not enormous force must have been used. The fracture was a compound one. The skull was of normal thickness.

The stick is a dry one, which looks as if it might break if used to deliver a heavy blow. It weighs 76 tolas as weighed before me, and is evenly balanced. Its length is 34 inches and it has a diameter of two inches.

The Sessions Judge made its weight 73 tolas, and the Committing Magistrate 65. Weights in this country are not uniform.

I note that the weight of a policeman's truncheon is 36 tolas as weighed before me.

The learned Sessions Judge after referring to the cases of *Thu Daw* v. *Queen-Empress* * and *Yan Thein* v. *King-Emperor*,† and Mayne's Criminal Law, came to the conclusion that the offence was murder. He held that in striking the blow appellant must be held to have intended to fracture the skull, and therefore to have known that the injury was so imminently dangerous that it must in all probability cause death.

* U. B. R., 1892—96, I, 215. | † U. B. R., 1897—1901, I, 282.

NGA NA BAN
v.
KING-EMPEROR.

There is no evidence on the record to show how the blow was delivered. Both Committing Magistrate and Sessions Judge omitted to ask the only eye witness how the appellant held the stick and in what way he delivered the blow. The appellant is entitled to the benefit of the doubt on this point.

Yan Thein's case differed in two important particulars; the weapon was longer and heavier and the accused repeated the blow after the deceased had fallen down.

In the case of *Thu Daw* again, the stick was longer and heavier, and two blows were struck, but, on the other hand, the accused was only 15 years of age, and it was held that he could hardly be assumed to have known exactly what would happen when he struck the blow. In *Queen-Empress* v. *Po Thet** referred to in *Yan Thein's* case the weapon used was a cutch club 2 feet long and 4 inches in circumference at the thick end, *i.e.*, the weapon was heavier and more dangerous than that used in the present case, and one blow only was struck.

On the principles followed in these cases there can be no doubt that the offence committed by appellant was culpable homicide not amounting to murder. Recent decisions of the Chief Court of Lower Burma have confined the last clause of section 299 and the 4th clause of section 300, Indian Penal Code, to cases where no intentional injury has been caused, to cases, that is, of the kind referred to in illustration (*d*) to section 300. In this view when a man deliberately strikes another the case can never fall under this category. If death results the accused must have either intended to cause death, or have intended to cause bodily injury likely to cause death, or have intended to cause bodily injury of a less serious nature. In either of the first two cases the offence would be culpable homicide. In the first it could also be murder; in the second possibly murder. In the third it would be voluntarily causing hurt, and possibly voluntarily causing grievous hurt. I am of opinion that this interpretation is correct. The latest decision in which it is set forth is that of *Shwe Ein* v. *King-Emperor*.† I venture to express my concurrence in Mr. Justice Fox's exposition of the law there given.

It follows that in a case like the present the last clause of section 299 and the 4th clause of section 300, Indian Penal Code, must be left out of consideration.

Appellant having admittedly struck deceased a blow on the head with the stick produced, and so caused his death, the first questions to be answered are: did appellant intend to cause death, or did he intend to cause injury likely to cause death? If the answer to both is no, then appellant did not commit the offence of culpable homicide. If the answer to the first is yes, the offence was culpable homicide and also murder. If the answer to the first is no and to the second is yes, then the offence of culpable homicide was committed and the further question arises whether this amounted to murder. There is nothing to indicate an intention to cause death.

* S. J. L. B., 508. | † 3 L. B. R., 122.

As to whether a blow with the stick above described was likely to cause death, we have the authority of the medical books for it, and it is also a matter of common knowledge that a blow with such a heavy stick on the human head is liable to produce a fatal result. I think, therefore, that appellant must be held to have intended bodily injury likely to cause death, *i.e.*, to have committed the offence of culpable homicide.

But it does not necessarily follow that he intended to cause bodily injury sufficient in the ordinary course of nature to cause death. The learned Sessions Judge appears to me to have been to some extent misled by Mayne's remarks on intention and knowledge. The passage to which he apparently refers is quoted in *Shwe Ein's* case. Mr. Justice Fox in that case and also in *Shwe Hla U* v. *King-Emperor* * has discussed and elucidated very clearly the distinction between what is likely, and what is probable: and shown that because death has resulted from blows it cannot be held in every case that the striker intended to cause injury sufficient in the ordinary course of nature to cause death.

I do not think the Sessions Court has correctly stated the distinction between murder and culpable homicide not amounting to murder in a case of the kind. As remarked by Melvill, J., in *Reg.* v. *Govinda*,† quoted in the former judgment, it is a question of degree of probability. The learned Judge went on to say: "Practically I think it will generally resolve itself into a consideration of the nature of the weapon used. A blow from the fist or a stick on a vital part may be likely to cause death, a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death." To this it may be added that the decision may depend on the size and weight of the stick where a stick is used, and on the way it is used. These points the Sessions Court does not seem to me to have fully appreciated. As in the case of *Shwe Ein*, where the facts were remarkably like those of the present case, including a single blow with a stick 78½ tolas in weight, I am of opinion that "it would be going too far to hold that Appellant must have known that he would probably cause death or vital injury and to conclude that he intended to cause injury sufficient in the ordinary course of nature to cause death. It is common knowledge that heads have stood blows with far more formidable weapons than the one used in this case."

The weapon, as I have said, is evenly balanced, and does not, in the hand, appear to be a heavy weapon, or one that would in all probability cause death or injury sufficient in the ordinary course of nature to cause death. A single blow was struck, and there is nothing to show that very great force was used. I think, therefore, that the Sessions Court was not justified in inferring that Appellant intended to fracture deceased's skull.

For these reasons I alter the conviction to one under section 304, clause 1, *i.e.*, of culpable homicide not amounting to murder, where the act was done with the intention of causing injury likely to cause death; and reduce the sentence to transportation for ten years.

* 2 L. B. R. 125. † I. L. R., 1 Bom., 342.

137

Stamps—62 (1) (*b*).

Before H. Adamson, Esq., C.S.I.

Criminal Revision No. 142 of 1904. May 10th.

KING-EMPEROR *v.* NGA SHWE BWIN.

Mr. *H. M. Lütter.*—Government Prosecutor, for the Crown.

Held,—that the mere receipt of an unstamped instrument does not constitute the offence of abetment of the execution of the instrument.

References:—

I. L. R., 7 Bom., p. 82.
——— 20, All., p. 440.
Upper Burma Rulings, 1892—96, page 313.

The accused was convicted of the abetment of an offence under section 62 (*1*)(*b*) of the Indian Stamp Act. He received a bond that had been executed without being duly stamped. There can of course be an abetment of an offence under section 62 of the Stamp Act, in the same way as there can be abetment of any other offence under a Special law, and it would be punishable under the Indian Penal Code. But the mere receipt of an unstamped instrument does not constitute the offence of abetment of the execution of such an instrument. This has been held in *Empress* v. *Janki** and *Queen-Empress* v. *Nehal Chand*.† The essentials of abetment as defined in the Penal Code are requisite in order to render the receiver of an unstamped instrument liable for the abetment of its execution. *S. R. M. M. Perianen Chetty* v. *Queen-Empress* ‡ is an instance where these essentials were present.

In the present case the accused was convicted on his own admission but his admission was clearly not an admission of guilt.

The conviction is set aside and the fine must be refunded.

* I. L. R., 7 Bom., p. 82. | † I. L. R., 20 All., p. 440.
‡ U. B. R., 1892—96, p. 313.

Stamps—43.

Before A. M. B. Irwin, Esq., C.S.I.

KING-EMPEROR *v.* NATARAJ AYER.

Criminal Revision No. 1080 of 1904.

January 26th, 1905.

The proviso to section 43, Stamp Act, does not justify a Magistrate in acquitting of an offence under section 62, for the reason that there was no intent to evade the law, but it may be a good ground for passing a merely nominal sentence.

See Criminal Procedure, p. 37.

Upper Burma Municipal Regulation—12 (d).

Before G. W. Shaw, Esq.

Criminal Revision No. 443 of 1904. September 22nd.

MAUNG SEIN *v.* MUNICIPAL COMMITTEE OF PAKÔKKU.

Mr. *Tha Gyaw*—for applicant. | Mr. *C. G. S. Pillay*—for respondent.

Held—that "Re-build" or "Re-erect" does not include "Repair."

Reference:—I. L. R., 19 Mad., 241.

Applicant re-roofed his house with *wagat*, or rather renewed part of the roof with *wagat*. The Municipality had apparently framed new rules under clause (*d*) of section 12 of the Upper Burma Municipal Regulation regarding the limits within which the use of certain inflammable materials was not permitted in building or repairing the walls or roofs of houses, but these new rules had not yet received the sanction of the Government.

The ward headman acting on instructions from the Municipal Office nevertheless ordered the applicant not to re-roof his house with *wagat* and he reported to the Municipal Secretary that the applicant had disobeyed this order.

Thereupon he was prosecuted at the instance of the Municipal Committee, for infringing Rule 37, and convicted and fined Rs. 15.

Rule 37 requires that any person who is about to build or re-build a house shall first give notice in writing to the Municipal Committee of his intention.

The Magistrate held that the words "re-build" and "repair" are synonymous, and that the applicant by repairing his house, or the roof of his house, had infringed the rule.

Now the rule itself directs that with the written notice a site plan of the *intended house* should be sent, and I think it is clear from this alone that what was intended was a new house. Apart from this "to re-build" means as defined in the dictionary to "build a new" or "construct a new," and certainly is not the same thing as "to repair." If it had been intended that whenever any repairs to a house were about to be carried out, notice should be given there cannot be a doubt that this would have been expressly stated in the rule. The Upper Burma Municipal Regulation was framed to suit the inchoate Municipal conditions of small towns in Upper Burma and its provisions in so far as they went followed the Municipal Act of 1884 which was then in force. The rule in question comes under the head of "house building" and corresponds to section 75 of the Municipal Act of 1884. The regulation of the materials used for constructing or renewing walls and roofs is dealt with in separate rules under the head of "fire" which correspond to other sections of the Act. Section 75 of the Act of 1884 required notice only in the case of "erecting or re-erecting"

MAUNG TUN v. FAZIL KADRE. 1904.

me." The next witness said: "The money was advanced to him to work." "The accused did not work after the execution of exhibit A." "The Rs. 30 was given to accused to work more." The next witness uses similar terms. There is nothing on the record to show that accused was only a contractor to supply coolies.

The application is therefore dismissed.

APPENDIX.

CIRCULAR MEMORANDUM NO. 1 OF 1904.

FROM

THE REGISTRAR,
JUDICIAL COMMISSIONER'S COURT,
UPPER BURMA,

TO

THE SESSIONS JUDGES AND DISTRICT MAGISTRATES,
UPPER BURMA.

Dated Mandalay, the 23rd April 1904.

It is observed that there is a tendency on the part of Magistrates to show undue leniency in the punishment of offences relating to fire in reserved forests [section 55 (*a*) and (*c*), Burma Forest Act].

Large sums of money are spent annually by Government in the protection from fire of forest reserves, and a forest fire may undo the protective work of years. The protection cannot be effective unless not only incendiarism but also the careless use of fire within forest reserves in contravention of the Forest Act and Rules is punished by deterrent sentences. Magistrates should therefore inpose such sentences as are necessary to prevent the unauthorized use of fire in reserved forests.

By order,
ED. MILLAR,
Registrar.

CIRCULAR MEMORANDUM NO. 2 OF 1904.

FROM

THE REGISTRAR,
JUDICIAL COMMISSIONER'S COURT,
UPPER BURMA,

TO

ALL SESSIONS JUDGES AND DISTRICT MAGISTRATES,
UPPER BURMA.

Dated Mandalay, the 13th July 1904.

THE attention of District Magistrates and Sessions Judges is invited to correction slip No. LVIII to the Upper Burma Courts Manual, whereby they are not required to submit the monthly fine statements as they have hitherto done. The monthly statements submitted by subordinate courts will now stop with the District Magistrate.

District Magistrates are expected, when inspecting courts, or at such other times as they may deem fit, to examine closely Registers II and X (Criminal) and give orders for the writing-off of all irrecoverable fines.

By order,
ED. MILLAR,
Registrar.

Whipping.

7. The attention of some Magistrates still needs to be directed to the appropriateness of whipping as a punishment in preference to short terms of imprisonment. See paragraph 104, Upper Burma Courts Manual.

Section 562, Code of Criminal Procedure.

8. Attention is invited to paragraph 18 of the Report.

Refund of Court-fees, section 31, Court-fees Act. Compensation awarded to accused under section 250, Code of Criminal Procedure.

9. It has been noticed that the obligations imposed on Magistrates by section 31, Court-fees Act, are frequently overlooked, and that section 250, Criminal Procedure Code, is not resorted to so frequently as it should be.

By order,

ED. MILLAR,
Registrar.

MANDALAY :
The 15th November 1904.

CIRCULAR MEMORANDUM No. 2 OF 1905.

FROM

THE REGISTRAR,

Court of the Judicial Commissioner, Upper Burma,

TO

ALL SESSIONS JUDGES AND DISTRICT MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 5th October 1905.

The following Memorandum of Instructions is circulated for the information and guidance of all Magistrates in Upper Burma:—

Memorandum of Instructions for the guidance of Police and other Officers in sending documents for examination by the Government Expert in Handwriting, or requiring his attendance in Law Courts.

1. Papers intended for examination by the Expert should, if possible, be placed flat, either between blank sheets or thin boards. If too large to allow of this being done, they should be rolled rather than folded. If folding cannot be avoided, care should be taken to refold into the original folds.

2. All papers should bear a distinguishing mark, such as A, B, C, or (1), (2), (3), *etc.* Any other writing on the document should be avoided. In cases of letters sent together with their envelopes or covers, the envelopes should bear a sub-mark or number to the letter it contained. Thus, if a letter is marked A, its covering envelope should be marked A1, or if the letter is marked 1, its envelope may be marked *1a*. In the case of documents already entered as Court exhibits, the Court marks will, of course, be observed.

3. In stitching or stringing papers together, care should be taken not to mutilate any written portions.

4. In cases where opinion is required on, or the attention of the Expert directed to, the signature only, or a portion of the writing, the particular portion should be indicated by being encircled in pencil (black lead, or red or blue chalk); ink marks should be avoided.

5. It is advisable to send as many specimens of the handwriting of the suspected person or persons as can conveniently be obtained.

Care should be taken as to the selection of these standards, and no writing should be characterized as admitted or genuine, unless it is absolutely certain that it is so.

6. Admitted writings, if undated, should, if possible, bear on them a pencil entry giving the probable date of the writing, *e.g.*, "said to have been written in July 1904." In the same way, if the disputed document bears no date, the supposed or probable date of writing, or the date of receipt, should be ascertained and noted.

7. In all cases where papers for examination are despatched to the Expert, they should be sent, carefully packed, by registered letter or parcel post addressed to—

CHARLES HARDLESS, ESQUIRE,

34, CREEK ROW, CALCUTTA,

accompanied by a memorandum or letter stating—

(*a*) the language of the writings;

(*b*) the number of exhibits sent, giving their distinguishing marks, and other necessary particulars, indicating separately the documents in question, *i.e.*, those on which opinion is sought, and the admitted documents with which comparison is to be made: these latter being classified according to their respective writers;

(*c*) the question to the Expert, clearly and precisely put, in regard to the particular writings or portions of writings on which opinion is desired;

(*d*) particulars of the case, such as title, number, date, names of complainant and accused, and section under which the charge is laid, together with any remarks on matters or points on which the Expert should be informed;

(*e*) if a case has already been instituted, the date fixed for the next hearing with name of Court of trial.

8. When the writings of a suspected individual are required to be examined, his pen and writing pad, if obtainable, should be sent. In such cases a piece of paper should be gummed on to the pen handle containing the name of the writer and a similar label affixed to the pad.

9. When sending sealing-wax impressions for examination, care should be taken in the packing, so that the wax or lac is not broken in transit by the post. A thin layer of cotton placed on either side of the portion containing the seal impression will afford safe protection.

10. In cases where the age of a document is in question, the greatest care should be taken to guard the document from handling or soiling, and especially to protect it from finger and other marks on the written characters. In such cases, if the pen and ink-pot, said to have been used in the writing, are available, they should be sent.

11. Whenever possible and convenient, papers should be sent to the Expert and an opinion obtained before they are put in evidence, but in cases where such a course is not possible as when the documents have already been filed, and become Court exhibits, and the Expert is summoned to Court direct, arrangements should be made to admit of

his seeing the papers before he is placed in the witness-box. If a large number of papers are to be examined, it may be advisable to send for the Expert a day or so in advance, so as to allow him time to study the papers before being called upon to give evidence concerning them.

12. Police Officers, Court Inspectors, and others who obtain summonses for the attendance of the Expert in cases in which he has not been previously consulted, should send immediate information to that officer as to—

(*a*) the language of the writings to be examined;

(*b*) whether the writings for examination or comparison are all contained in separate documents, or also in books or registers;

(*c*) whether the question is one of identification of writing or also of ink test.

13. As long a notice as possible should be given to the Expert as to his attendance in Court being needed, and efforts should be made to arrange for dates suitable to him with regard to his other engagements.

By order,

ED. MILLAR,

Registrar.

CIRCULAR MEMORANDUM No. 3 OF 1905.

FROM

THE REGISTRAR,

Court of the Judicial Commissioner, Upper Burma,

To

THE SESSIONS JUDGES AND DISTRICT MAGISTRATES, UPPER BURMA.

Dated Mandalay, the 19th December 1905.

1. The Judicial Commissioner invites special attention to the points referred to in paragraphs 2 and 3 of the Resolution of Government on the Criminal Justice Report for the year 1904, and hopes that District Magistrates will specially impress on Subordinate Magistrates the necessity for improvement.

Instructions relating to most of these points have already been issued in Circular Memorandum No. 2 of 1903.

Adjournments.

2. Magistrates who have to go out on tour should prepare their tour programmes, as far as possible, in advance, and adhere to them as closely as they can. The practice of fixing cases for hearing on days when the Magistrate knows, or should know, that he will be on tour and will not be able to hear them, is inexcusable.

Classification.

3. The classification of cases still leaves room for improvement. Attention has now been drawn to this matter for three years in succession, and it is hoped that Magistrates will apply their minds to the instructions more successfully than they have done hitherto.

Criminal trespass.

4. Special attention is drawn to the remarks relating to the entertainment of complaints in cases of Criminal trespass in paragraph 6 of the Criminal Justice Report.

Preventive sections.

5. Proceedings under sections 109 and 110, Code of Criminal Procedure, still continue to be sanctioned without adequate scrutiny of Reports of Police Officers. This point was dealt with in paragraph 6 of Circular Memorandum No. 3 of 1904 of this Court.

Rewards in Excise and Opium cases.

6. The payment of rewards in Excise and Opium cases is frequently ordered by Magistrates and more frequently paid out of the fines. This is contrary to the orders of Government in Excise Directions 20—22, and Opium Directions 32 and 33, and in regard to Opium cases is illegal besides.

Section 512, Code of Criminal Procedure.

7. The procedure of Subordinate Magistrates in recording evidence under section 512, Code of Criminal Procedure, is still incorrect. Before witnesses are examined the law requires proof to be taken that the accused has absconded and that there is no immediate prospect of arresting him. Magistrates should bear this in mind when action under this section is called for.

Fermented *tari*.

8. In spite of the Ruling of this Court in *K.-E.* v. *Mi Thit* (U. B. R., 1904-05, Excise 3), declaring that the offence of manufacturing fermented *tari* cannot be committed, some Magistrates still convict in such cases. The Judicial Commissioner hopes that prosecutions on the charge of manufacturing fermented *tari* will be discontinued, but Magistrates must follow the Rulings of this Court.

Attention is also invited to Excise Direction 7. In case of offences relating to *tari*, the fact that place where the offence was committed is within a radius of five miles from a licensed *tari* shop should always be recorded in the proceedings.

By order,

ED. MILLAR,

Registrar.

158

CIRCULAR MEMORANDUM No. 1 OF 1906.

FROM

THE REGISTRAR,

Court of the Judicial Commissioner, Upper Burma,

TO

ALL SESSIONS JUDGES AND DISTRICT MAGISTRATES, UPPER BURMA.

Dated Mandalay, the 12th January 1906.

It has been represented that Magistrates, particularly Honorary Magistrates, habitually pass merely nominal sentences on convictions of breach of sanitary bye-laws framed by Municipal Committees under the Burma Municipal Act, 1898, with the result that the bye-laws are constantly and persistently disregarded.

As the enforcement of these bye-laws is a matter of much importance and closely concerns the health of the people in Municipal towns, the Judicial Commissioner desires the attention of Magistrates, especially Honorary Magistrates, to be drawn to the expediency of passing sufficiently deterrent sentences in such cases as will secure the observance in future of the bye-laws in question.

By these instructions it is not suggested that exceptionally heavy sentences are desirable.

By order,

ED. MILLAR,

Registrar.

CIRCULAR MEMORANDUM No. 2 OF 1906.

FROM

THE REGISTRAR,

Court of the Judicial Commissioner, Upper Burma,

TO

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 23rd July 1906.

The attention of Magistrates is drawn again to paragraph 104, Upper Burma Courts Manual. The Jails returns for 1905 show a considerable increase in the number of persons sent to prison for a term not exceeding one month. A very short term of imprisonment is ordinarily not deterrent as a punishment, and the increase of such short-term prisoners adds unduly to the work of the Jail Department.

By order,

ED. MILLAR,

Registrar.

CIRCULAR MEMORANDUM No. 3 OF 1906.

FROM

THE REGISTRAR,

Court of the Judicial Commissioner, Upper Burma,

To

THE SESSIONS JUDGES AND DISTRICT MAGISTRATES, UPPER BURMA.

Dated Mandalay, the 3rd September 1906.

With reference to paragraphs 229 and 352, Courts Manual, and Judicial Department letter No. 1371—W.-16, dated the 30th June 1906, from the Secretary to the Government of Burma to the Inspector-General of Police, Burma, a copy of which was forwarded to you by the Assistant Secretary to the Government of Burma with his Judicial Department endorsement No. 1372—W.-16, dated the 30th June 1906, concerning the preparation of the nominal roll in Jail Form 46, attached to the warrants of convicts of certain classes, with special reference to the entry made by the District Superintendent of Police in column 4, I am directed to draw your attention to the necessity of the careful and intelligent preparation of these rolls, and in particular to request you to see that the entries in column 4 are sufficiently full and descriptive.

2. Superintendents of Jails and the Board which examines convicts whom it is proposed to send to Port Blair have been instructed to refer to the sentencing Court in cases in which the rolls seem to have been carelessly prepared.

3. I am to ask that you will give due consideration to such references should any be made.

By order,

ED. MILLAR,

Registrar.

163

CIRCULAR MEMORANDUM No. 5 OF 1906.

FROM

THE REGISTRAR,

Court of the Judicial Commissioner, Upper Burma,

TO

ALL SESSIONS JUDGES AND DISTRICT MAGISTRATES, UPPER BURMA.

Dated Mandalay, the 13th December 1906.

The attention of the District Magistrates is drawn to the new additions to the Upper Burma Courts Manual (paragraphs 172A and 436A).

Paragraph 172*A*.—Disrict Magistrates are requested to instruct the Police and the Subdivisional Magistrates to strictly follow this rule.

Paragraph 436*A*.—District Magistrates are requested to see that the required particulars are punctually and regularly furnished to the District Superintendent of Police.

By order,

ED. MILLAR,

Registrar.

CIRCULAR MEMORANDUM No. 7 OF 1906.

FROM

THE REGISTRAR,

Court of the Judicial Commissioner, Upper Burma,

To

THE DISTRICT MAGISTRATES, UPPER BURMA,

Dated Mandalay, the 17th December 1906.

In order that the figures shown in the Abstract Statement of Criminal Judicial Fines (Upper Burma $\frac{\text{Judicial}}{\text{Criminal 33}}$) may agree with the figures compiled by Headquarters Treasuries, in future all Subordinate Courts that pay fines into Sub-Treasuries, should exclude from the Statement of Criminal Judicial Fines (Upper Burma $\frac{\text{Judicial}}{\text{Criminal 86}}$) of one month sums realized after the 25th of the same month and include them in the statement of the following month.

By order,

ED. MILLAR,

Registrar.

G. B. C. P. O.—No. 18, J. C. U. B., 1-12-1914—1,000—D. L.