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1907—09

CRIMINAL

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TABLE OF CONTENTS.

CRIMINAL.

APPENDIX.

TABLE OF CASES.

TABLE OF CASES—*concluded.*

INDEX

TO THE

UPPER BURMA RULINGS

For the years 1907—1909.

CRIMINAL.

Arms—13, 15.

Criminal Revision No. 639 of 1907. November 12th.

Before G. W. Shaw, Esq.

NGA KAING *vs.* KING-EMPEROR.

Mr. *A. C. Mukerjee*—for Applicant. *Mr. H. M. Lutter, Government Prosecutor*—for the Crown.

Held,—that a Sub-Inspector of Police not of the 1st grade who had been presented by Government with a revolver, committed no offence by possessing and going armed with a dagger.

References—

U. B. R., 1897—1901, I, 1.

Government of India Notification No. 518 of 1879 and Local Government Notification No. 236 of 1898.

Arms Manual, pages 12, 105, 168.

The District Magistrate having sanctioned his prosecution for illegal possession under section 19 (*f*), Applicant, a Sub-Inspector of Police, was convicted under section 19 (*e*), Arms Act, of going armed with a dagger without a license, and sentenced to a fine of Rs. 25 or in default one month's rigorous imprisonment.

The proceedings do not show as they ought to have done, whether Applicant is or is not a 1st grade Sub-Inspector. As Judicial Department Notification No. 314 of 1914 * discriminates, this was obviously necessary. It may, however, be assumed that Applicant is not of the 1st grade, since he claims exemption not under clause (3), but under clause (18) of paragraph I of Notification No. 518 of 1879, † on the ground that he has been presented by Government with a six-chambered revolver.

The question is whether the exemption covers a dagger. Judicial Department Circular No. 37 of 1896 ‡ has been referred to. But it is unnecessary to discuss it. Judicial Department Notification No. 236 of 1898, as amended by Judicial Department Notification No. 333 of the same year, § is what we have to do with.

The proviso to paragraph I of Notification No. 518 authorizes a Local Government to declare what quantities of arms or ammunition are reasonable for exempted persons to possess.

I apprehend that the exemption conveyed by clause (18) of the Government of India Notification *primâ facie* applies to all description of arms and ammunition, except those expressly mentioned in paragraph I, and that this exemption continues in force, except so far as it may have been limited by a declaration of the Local Government made under the proviso.

I think it follows that if the Local Government declares that the quantity of fire-arms, which it is reasonable for a person exempted under clause (18) to carry, is the actual fire-arm presented, that declaration does not affect other arms. Judicial Department Notification No. 236 of 1898 above cited is a declaration of the kind.

*Arms Manual, page 105.

†——12.

‡Arms Manual, page 168.

§——105.

NGA KAING
v.
KING-EMPEROR.

It does not limit the quantity of arms other than fire-arms which a person exempted under clause (18) of Notification No. 518 may carry.

The District Magistrate apparently overlooked this fact, as well as the fact that section 15 of the Act does not apply to Burma.

I am therefore of opinion that the Applicant committed no offence by going armed with the dagger.

The learned Government Prosecutor then contends that the conviction and sentence are sustainable because, by giving the dagger to Po Kaing to carry, Applicant abetted Po Kaing in the offence of going armed in contravention of section 13 of the Act.

Here again I think the case is clearly covered by *Queen-Empress v. Myat Aung.** Applicant had been out investigating a case, and was armed with the dagger. On his way back, and when he got near the village of Mayagan, he handed it over to Po Kaing, a villager, to carry for him. Po Kaing fell behind in the village, and Applicant next found him in the Headman's compound, when he exhibited indications of being drunk. There is nothing to show that Applicant was responsible for Po Kaing staying behind, or knew that Po Kaing was drunk or was going to get drunk, when he gave him the dagger. I think that the prosecution was a mistake, and that Applicant has been unfairly as well as unjustly treated.

I set aside the conviction and sentence and direct that the fine be refunded.

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*U. B. R., 1897—01, I, 1.

Criminal Procedure—190, 195, 476, 439.

Criminal Miscellaneous No. 9 of 1906.
February 5th, 1907.

Before G. W. Shaw, Esq.

NGA KAING *v.* KING-EMPEROR.

Mr. *S. Mukerjee*—for Appellant *vs.* Mr. *H. M. Lutter*—Government Prosecutor, for the Crown.

Difference between a sanction and a complaint.

Power of High Court to revise an order made under section 476, Criminal Procedure Code.

Held,—Granting sanction implies that someone wishes to prosecute but cannot do so without the sanction prescribed by section 195, Criminal Procedure Code, because no Court will take cognizance without it. Where it is the Court or public servant itself or himself that wishes to prosecute, sanction is not required. All that is wanted is the complaint of that Court or public servant.

Held, also,—A complaint under section 476 is an order within the meaning of sections 435 and 439, Criminal Procedure Code, (read with section 423), and the High Court has power to set it aside in Revision.

References :—

I.L.R., 18 All., 213.
————26 All., 249.
————26 Bom., 785.
————20 Cal., 349.
————21 Mad., 124.
————26 Mad., 98.
36 P. R., 58.
U. B. R., 1904-06, Crl. Pro., 4.
————————Evidence, 3.

One Nga Lat made certain charges against a village headman in a petition to the Deputy Commissioner. The Township Officer held an enquiry and made a report. The Deputy Commissioner "sanctioned the prosecution" of Nga Lat under section 182, Indian Penal Code. On the trial of Nga Lat certain witnesses supported Nga Lat's charges against the headman and said that, when examined by the Township Officer, they made false statements at the instigation of Applicant, Paw U the headman's brother, in order not to get the headman into trouble.

The Magistrate examined Applicant as a witness with reference to the allegations made by the witnesses against him, and he denied them. The Magistrate then acquitted Nga Lat and "granted sanction" for the prosecution of Applicant on various charges with respect to the "tutoring" of the witnesses in the Township Officer's enquiry and for giving false evidence in the trial of Nga Lat.

The Sessions Judge, treating this as a sanction, modified the Magistrate's order.

The Court of Session, the Deputy Commissioner and the Headquarters Magistrate have all overlooked the difference between a sanction to prosecute and a complaint, and have also apparently overlooked the fact that section 190, Criminal Procedure Code, applies to offences mentioned in section 195 as well as to others: that is to say, a Magistrate can only take cognizance of an offence mentioned in section 195 in one of the three ways specified in section 190, and section 195 further declares that, except where the Court or public servant concerned is the complainant, its or his sanction is necessary.

NGA PAW U v. KING-EMPEROR.

The Code does not contemplate a Court or public servant giving sanction where no application for sanction has been made. If a Court or public servant thinks it necessary to initiate a prosecution the proper course is to make a complaint. As far as Civil, Criminal and Revenue Courts acting in the course of a judicial proceeding are concerned, the procedure to be followed is prescribed in section 476, and in that case the Magistrate who takes cognizance of the offence is not required to examine the complainant on oath (see section 200). Other Courts or public servants are not specially provided for. They are in the category of ordinary complainants.

Granting sanction implies that someone wishes to prosecute but cannot do so without the sanction prescribed by section 195, because no Court will take cognizance without it. Where it is the Court or public servant itself or himself that wishes to prosecute, sanction is not required. All that is wanted is the complaint of that Court or public servant. Hence all that the Court or public servant has to do in that the case is to make the complaint, and the question of sanction does not arise

The view which I have taken was also taken by the Allahabad High Court in *In the matter of a petition of Banarsi Das* * and by the Chief Court of the Punjab in *Atma Ram v. Emperor*† (1901). The distinction between a sanction and a complaint is important, because the provisions relating to revocation of sanction in clause (6) of section 195 do not apply to complaints.

In the present case the Deputy Commissioner's so-called sanction to the prosecution of Nga Lat appears to have been really a complaint. There is nothing to show that anybody had applied for sanction to prosecute and there is no other complaint.

Again the Headquarters Magistrate in granting sanction to prosecute the Applicant, Paw U, had not been applied to by anyone for sanction, and it is evident that what he really meant to do was to make a complaint under section 476.

It follows, first of all, that the Sessions Judge's proceedings were without jurisdiction and must be set aside. The next question is whether the Headquarters Magistrate's complaint under section 476 can or should be interfered with by this Court in Revision.

A complaint under section 476 is, I think, clearly an order within the meaning of sections 435 and 439 (read with section 423), and I have no doubt of the power of this Court to set it aside in Revision.

This view has been taken by all the Indian High Courts, though they are not now all in agreement. It is sufficient to cite *In re Bal Gangadhar Tilak* ‡ (1902) in which the decisions of the different High Courts were reviewed, and the conclusion was come to that all had concurred in the view that the power of Revision conferred by section 439 extended to orders passed under section 476, and *Eranholi Athan* vs. *King-Emperor* (1902).§ I venture to question the

*I. L. R., 18 All., 213.
†36 P. R., 58.
‡I. L. R., 26 Bom., 785.
§———, 26 Mad., 98.

correctness of the last mentioned decision in giving the effect it did to the words in the second clause of section 476 "and as if upon complaint made and recorded under section 200", which were interpolated in the Code of 1898. They refer to the procedure of the Magistrate to whom the case is sent under the first clause of the section, and merely direct how that Magistrate is to deal with the case when he receives it. It appears to me that the order of the Court which records the case remains none the less an order, and in the absence of any express exemption in sections 435 and 439, the provisions of these sections should be taken to extend to such an order. I think the previous Full Bench decision of the same Court in *Queen-Empress* vs. *Srinivasalu Naidu* * (1898) is still right. I am supported in this view by *In the matter of Bhup Kunwar and others*† (1903).

Ordinarily the High Court would not interfere with an order made under section 476. The principles by which it would be guided are those explained in *Lachmanan Chetti* vs. *King-Emperor* ‡ and in *Chaudhuri Muhammad Izharul Haqq* vs. *Queen-Empress* § (1892). In a case where there is manifest injustice or where the Court acting under section 476 has not exercised its discretion in a proper way, it is right that the High Court should use its Revisional powers.

In the present case I am of opinion that the order was an improper one and should not be allowed to stand. As regards the charge of having "tutored" certain witnesses, or, in other words, instigated them to make false statements, if the witnesses, in the proceedings before the Township Officer had been legally bound to state the truth, the charge would have been one of abetting the giving of false evidence (sections 193—109, Indian Penal Code). But as the witnesses were under no such obligation, that offence could not be committed. And the facts would not amount to any other offence in respect of which the Magistrate had power under section 476 to make a complaint.

As regards the charge of giving false evidence (section 193), the Headquarters Magistrate appears to me to have used a very unwise discretion. A number of witnesses had made certain charges against the Applicant who was not in any way before the Court, but happened to be present listening to the proceedings. The Magistrate then put Applicant on oath and asked him whether he had done the things laid to his charge. He denied everything. This is the alleged false evidence with respect to which the Magistrate thought good to make a complaint against him. I am of opinion that this was not a proper course to take.

No doubt section 132, Evidence Act, is against the Applicant. But in the circumstances the Magistrate's proceedings were unfair to

*I .L. R., 21 Mad., 124.
†———, 26 All., 249.
‡U. B.R., 1904-06, Criminal Procedure, p. 4.
§I. L. R., 20 Cal., 349.

NGA PAW U v. KING-EMPEROR.

the Applicant. I do not think that he ought to have examined him as a witness, but if he did, he ought not to have lodged a complaint against him of giving false evidence by his answers.

The course which he took appears to me to be opposed to the spirit of the law, that no person accused of an offence should be called upon to make a statement on oath, or be liable to punishment for giving false evidence in answer to questions relating to the charge against him. He is a competent witness and it is open to a Court or Magistrate to examine him as a witness in certain circumstances as explained in *Po Yin* vs. *King-Emperor*.* But that is a different thing from examining him as a witness practically with the object of making him criminate himself, and then prosecuting him for giving false evidence if he does not criminate himself.

For these reasons I set aside the so-called sanction granted by the Headquarters Magistrate, or, in other words, the complaint which he in effect made under section 476, Criminal Procedure Code.

*U.B.R., 1904-06, Evidence, p. 3.

Criminal Procedure—239.

Criminal Revision No 3 of 1907, March 26th.

Before G. W. Shaw, Esq.

NGA NYO GYI *vs.* KING-EMPEROR.

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

Same transaction.

Held,—that acts connected together need not be simultaneous to be parts of the same transaction within the meaning of section 239, Criminal Procedure Code, and that ordinarily theft and the disposal of the proceeds would be parts of the same transaction.

References :—

I.L.R., 27 Cal., 839.
————28 Cal., 7, 10.
————25 Mad., 61.
1 C.W.N., 35.
2 L.B.R., 19 (followed).
U.B.R., 1904-06, Cri. Pro., 2.
————, 1904-06, Penal Code, 9.

The Applicant, Nyo Gyi, was convicted of the theft of some buffaloes in the same trial with three men who were convicted of voluntarily assisting in the disposal of the buffaloes, knowing them to be stolen.

On appeal the Sessions Judge upheld the conviction of at least one of these men, but set aside the conviction and sentence and ordered a retrial in the case of Nyo Gyi.

Nyo Gyi's Advocate had drawn his attention to the Calcutta decision in *Karu Kalal* vs. *Ram Charan Pal** (1900), and he was guided by that decision.

The learned Sessions Judge was misled by the Advocate. *Karu Kalal* vs. *Ram Charan Pal* followed *In the matter of Abdul Rahman*** (1890), *Kali Prasad Mahisal* vs. *Empress*† (1900) and *Bishr Bunwar* vs. *Empress* ‖ (1896).

The first two decisions dealt with the effect of misjoinder and must be taken to have been overruled by the Privy Council in *Subramania Ayyar* vs. *K.-E.* ¶ (1901).

Bishn Bunwar's case laid down the proposition that theft and disposal of the proceeds are not parts of the same transaction unless they take place simultaneously. This decision was dissented from still more recently by the Chief Court of Lower Burma in *Ta Pu and others* vs. *K.-E.**** (1902).

The Privy Council case is referred to and followed in *K.-E.* vs. *Asgar Ali* †† and *K.-E.* vs. *Tôk Kyi.*‖‖

On the authority of that Ruling, if there had been misjoinder in the present case, the whole proceedings were invalid. Not Nyo Gyi only but the other men who were tried with him would have had to be tried again.

But there was no misjoinder. In the Lower Burma case to which I have referred, the meaning of the words "same transaction" in

*I.L.R., 28 Cal., 10.
**————, 27 Cal., 839.
†————, 28 Cal., 7.
¶————, 25 Mad., 61.
‖ 1 C.W.N., 35.
***2 L.B.R., 19.
††U.B.R., 1904-06, Cr. Pro., p. 2.
‖‖————Pen. Code, p. 9.

Nga Nyo Gyi v. King-Emperor.

section 239, Criminal Procedure Code, was fully examined with reference to the view taken in *Bishn Bunwar vs. Empress* that a person charged with receiving stolen property could not be tried together with persons charged with the theft of the property.

I entirely concur in the conclusion come to by the late Chief Judge that ordinarily theft and the disposal of the proceeds would be parts of the same transaction, and that as proximity of time between two acts does not necessarily constitute them parts of the same transaction, so an appreciable interval of time between two acts, otherwise connected, does not prevent them from continuing to be parts of the same series of connected events, and hence it is not necessary to show that the theft and disposal occurred within a few hours or even a few days of each other.

The learned Chief Judge's reference to section 235 (1) of the Code and the illustrations to that sub-section appears to me to place beyond doubt that this is what the framers of the Code meant by "the same transaction." It is the meaning which the words have always, as far as I know, been understood to bear in Burma, where it has been the ordinary practice for a great many years to try persons accused of theft and the disposal of the proceeds together.

I have no hesitation in holding that the view taken by the Calcutta High Court Judges was wrong.

The present case was one of the ordinary kind. The alleged theft was committed in July, the alleged dishonest disposal, in the same month, at places but a few miles distant from the scene of the theft. The accused were all relations.

In these circumstances there is no reason to regard the receiving or disposal otherwise than as part as the same transaction with the theft. Hence there was no illegality in the joint trial of the accused.

The Sessions Judge's order reversing the conviction and sentence in the case of Nyo Gyi and directing his retrial is set aside, and it is ordered that the Sessions Judge proceed to dispose of the appeal on its merits.

In view of this order it is unnecessary to consider the application of Nyo Gyi for the transfer of the case.

Criminal Procedure—337, 339.

Criminal Appeal No. 123 of 1907. October 17th.

Before G. W. Shaw, Esq.

NGA PO HNAN *v.* KING-EMPEROR.

Mr. S. Mukerjee for Appellant. *Mr. H. M. Lütter*—for the Crown.

Withdrawal or revocation and forfeiture of pardon.

When the question of forfeiture should be taken up and the approver tried.

Impropriety of putting the approver back into the dock and committing him for trial in the same proceedings with his co-accused.

Held,—That a pardon is forfeited by the approver's own act in concealing a material fact or giving false evidence; that if this is clearly established after he has been examined before the Committing Magistrate it is not necessary that he should be examined as a witness in the trial, but that ordinarily proceedings against an approver who has forfeited his pardon should be taken after his co-accused have been tried.

Also,—that to convict an approver on evidence taken before he was put back into the dock, is an irregularity calculated to prejudice him; and where the particular points on which it was alleged that an approver had given false evidence and so forfeited his pardon were not clearly put before him, so as to give him a fair opportunity of meeting the allegation.

Held,—that he was prejudiced in his defence.

References :—

I.L.R., 14 All., 336, 502.
————20 All., 529.
————23 Bom., 493.
————25 Bom., 675.
————24 Mad., 321.
P. R. 37 No. 34.
————38 No. 4.

This is a case of some difficulty. Appellant, Po Hnan, was along with others sent before the Subdivisional Magistrate on a charge of dacoity at Paunggyin, on the 7th February last. A pardon was tendered to him by the District Magistrate under section 337, Criminal Procedure Code, and accepted. He was examined by the Subdivisional Magistrate in the enquiry preliminary to commitment. His statement was a very long one and was not finished the first day. It began on the 15th March. Fifteen witnesses had been examined that day, the first of the enquiry, and then Appellant was examined. When his examination was continued on the 16th, he said that he wished to correct what he had said wrongly the day before. He then gave what he said was the true account of the way the dacoity was arranged. Other witnesses were examined after him on the 16th and on the 23rd March and on the 3rd April. Then on the 4th April the Subdivisional Magistrate "revoked" the pardon, as he evidence; that although he had partially retracted that false evidence; that although he had partially retractetd that false evidence, his whole statement was valueless. The District Magistrate accepted this view and tendered a pardon to another of the accused. Appellant was then put back into the dock, charged and committed for trial along with the other accused. The witnesses for the prosecution were not re-examined, and the record does not show that Appellant was given an opportunity of cross-examining them.

NGA PO *HNAN* v. KING-EMPEROR.

At the trial Appellant pleaded guilty, but said that he had not forfeited his pardon.

The Sessions Judge held that the Appellant had had an opportunity of cross-examining the witnesses "so the commitment stands." He also held that Appellant had forfeited the pardon, and convicted him and sentenced him to 7 years' rigorous imprisonment.

There are numerous decisions of the Indian High Courts dealing with cases of the kind. The following are the chief:—

(1) *Q.-E.* vs. *Sudra* * (1892). As in the present case, the Committing Magistrate "withdrew" the pardon and committed the approver for trial along with his co-accused. It was held that the approver ought to have been examined as a witness *in the trial*, and that he should not have been tried till afterwards.

(2) *Q.-E.* vs. *Mulua* † (1892). One of the accused, who pleaded guilty in the Sessions Court, was offered a pardon and accepted it, and was examined as a witness. The Sessions Judge thought his evidence untrue, without any material for such a conclusion, put him back into the dock along with his co-accused and convicted him. The Judges held that he ought not to have been put back into the dock as if he had never received an offer of pardon, but his trial should have been separate from and subsequent to that of the co-accused. They were doubtful as to the proper course to pursue; but set aside the conviction and directed a retrial, at which it was said the accused would have to plead his pardon.

(3) *Q.-E.* vs. *Brij Narain Man* ‡ (1898). A dacoity case. One of the accused was pardoned and examined by the Committing Magistrate who, after the examination of some other witnesses, thought had he had not made a full disclosure, "withdrew" the pardon, put him back into the dock and committed him along with his co-accused. The witnesses were not re-examined or cross-examined. The case came before the High Court before the trial, and the commitment was quashed on the ground that the accused had not full opportunity of cross-examining witnesses examined before the pardon was withdrawn, but the Judges held, dissenting from Sudra's case, that if a fresh commitment was made in time, there was no reason why the accused should not be tried along with his co-accused.

(4) *Q.-E.* vs. *Bhau* § (1898). The Committing Magistrate "withdrew" a pardon after examining as a witness the approver and other witnesses, and put the approver back into the dock and committed him along with his co-accused. The witnesses were not re-examined or cross-examined. The case came before the High Court before trial. It was held, following *Mulua's* and other cases, that the commitment was illegal by reason of the accused not having had an opportunity of cross-examining the witnesses. The learned Judges also expressed the opinion that no action can be taken against

*I.L.R., 14 All. 336.
†———*Ibid* 502.
‡I.L.R., 20 All. 529.
§———23 Bom., 493.

a person who has accepted a pardon, for breach of the conditions on which the pardon was tendered until after the trial in the Court of Sessions is finished, and then his trial should be commenced *de novo*.

(5) *Q.-E.* vs. *Ramsami* * (1900). After making a statement and receiving a pardon, an accused person was examined as a witness in the preliminary enquiry by the Committing Magistrate, and retracted his previous statement. He was not examined in the Sessions trial, but after that was over the pardon was withdrawn by the District Magistrate and he was committed for trial by the same Magistrate who had committed his co-accused previously. It was held that the commitment was legal, that the words "in the case" used in clause 2 of section 337, Criminal Procedure Code, includes proceedings before the Committing Magistrate; that there is no duty on the prosecution to put in, as a witness in the trial, an approver, who has withdrawn his statement; that a pardon may be withdrawn as soon as good faith is broken. But the learned Judges thought that no steps should be taken till after the trial of the co-accused is over.

(6) *K.-E.* vs. *Bala and Narayan* † (1901). After examining an approver as a witness, the Committing Magistrate "withdrew" the pardon, being of opinion that he had concealed a material fact, and committed him for trial along with the other accused. It was held that it was not proved that the pardon had been forfeited, as it was not proved that a material fact had been concealed, that, if not forfeited the pardon was still in force, and that the question whether the accused had forfeited the pardon by some act of his own was a question of fact. The learned Judges doubted the correctness of *Q -E.* vs. *Bhau*, and thought that "in a case" includes proceedings before the Committing Magistrate. The conviction was set aside and the accused discharged.

(7) *Kunwar Singh* vs. *Emperor* ‡ (1902). The facts were similar to the cases previously described. It was held that an approver should not be tried unless the prosecution establishes a breach of the conditions on which the pardon was tendered, and there is proof of a concealment of fact or of false evidence. The conviction was set aside and the accused acquitted and released.

(8) *Ghulam Muhammad* vs. *Crown* § (1903). A pardon was tendered to an accused person on a statement made before the preliminary enquiry began, when he was examined by the Committing Magistrate as a witness he withdrew his previous statement. The pardon was then "withdrawn" and the accused committed for trial at once along with his co-accused. The Sessions Judge used his incriminating statement against him and convicted him.

It was held that the procedure was quite irregular, that two courses were open (1) to proceed with the trial of the co-accused leaving it to the approver to reconsider his position in the Sessions

*I.L.R., 24 Mad., 321.
†————25 Bom., 675.
‡P. R., 37, No. 34.
§————38, No. 4.

NGA PO HNAN v. KING-EMPEROR.

Court, and proceeding against him afterwards if necessary, or (2) to begin *de novo* the trial of both accused jointly after withdrawing the pardon, in which case the statement of the approver could not be used because of section 24, Evidence Act. To enable clause 2 of section 339, Criminal Procedure Code, to operate, all the provisions relating to the tender of pardon must have been followed, including the examination of the approver as a witness in the case.

Although not altogether in agreement, these decisions are all helpful.

The important point is whether the accused person, who has accepted a pardon, has in fact forfeited the pardon by wilfully concealing a material fact or by giving false evidence. If this is clearly shown to be the case, after the accused has given evidence in the preliminary enquiry, I think that the view taken in *Q.-E.* vs. *Ramsami* and *K.-E.* vs. *Bala* and *Narayan* is correct, that it is not necessary that he should be examined as a witness in the Sessions Court, and consequently in that case his incriminating statement may be used against him, although he has not been so examined. There is no manner of doubt, however, that to commit the approver for trial on evidence taken before he was put back into the dock without re-examining the witnesses or giving him an opportunity of cross-examining them, is an irregularity that is calculated to prejudice him, and it appears to be universally agreed that ordinarily the proper course is, to take no proceedings against an approver till after his co-accused have been tried.

It is also to be observed that the Criminal Procedure Code does not say anything about withdrawing or revoking a pardon. The withdrawal or revocation of a pardon is a superfluous proceeding which has no effect whatever.

In the present case it would certainly have been preferable if the Committing Magistrate had left the question of the forfeiture to be dealt with after the Sessions trial. Under any circumstances, it was not proper to put Appellant back into the dock and to commit him for trial in the same proceedings. The omission to re-examine the witnesses was highly irregular, and was calculated to prejudice the Appellant seriously.

But the learned Government Prosecutor contends that, in face of Appellant's plea of guilty, it must be held that he was not in fact prejudiced by the omission to re-examine the witnesses for the prosecution. And so far as the question of his complicity in the dacoity is concerned, I am of opinion that that contention is correct. Section 537, Criminal Procedure Code, therefore applies.

But when we come to consider the question whether the Appellant forfeited the pardon, the case is different. It had to be shown that Appellant wilfully concealed something essential or gave false evidence.

It is clear from what he said himself on the 16th that he had not made a full and true disclosure of the whole of the circumstances on the previous day. But his examination was not finished, and I think it was open to him to correct what was wrong. He had at

first given it to be understood that he was invited at the last moment to join in the dacoity, and he explained finally that in fact he had been the originator or one of the originators, and that there had been many preliminaries in which he was concerned, including an abortive attempt to commit the dacoity some days before it was actually committed.

On consideration, it does not appear to me that this is a very material difference. I have grave doubt whether Appellant can be said to have forfeited his pardon by these inconsistencies.

The Sessions Judge apparently went on two other points, (1) Appellant's describing the actions of 7 dacoits, whereas there were no more than 5, (2) Appellant's inconsistent statements with reference to the two guns. To take the last first, I am unable to see that there was any material discrepancy. Appellant first said that he did not know about the guns till Po Aung told him. A little later he said that Po Han had told him. Po Han was a "disciple" of Po Aung's. Having regard to the loose habits of thought and speech which prevail among Burmans, such a discrepancy as this cannot be regarded as serious, especially as there were several interviews, and the witness's memory might have easily been confused.

In reference to the number of dacoits, this was really the point on which depended the question whether Appellant had forfeited his pardon or not.

The first remark to be made is that Appellant clearly had not a fair opportunity of meeting it. It was not clearly put before him that he was considered to have forfeited his pardon by stating that there were 7 dacoits when in fact there were only 5.

I think he was prejudiced in his defence, and I should feel obliged to order a retrial as was done in similar circumstances in the case of *Q.-E.* vs. *Mulua* cited above.

But I am of opinion that the evidence did not satisfactorily show *primâ facie* that there were no more than 5 dacoits.

We have the evidence of the witnesses who were present at the time of the dacoity, and the evidence as to the tracking of the dacoits.

The witnesses present at the dacoity spoke of 5 dacoits only. Some of them did not profess to have been able to tell how many dacoits there really were. The house owner and his wife were in this category. Another took the number to be 5, but did not count. Another said there were 5 or 6. Three neighbours "saw 5 dacoits."

The last mentioned ought no doubt to have been able to say with certainty how many dacoits there were. But, as recorded, their statements do not give the impression of certainty.

As to the tracks, so far as the evidence goes, the tracks found were diagnosed as the tracks of 5 men. But there is nothing to show whether, in spite of that fact, there could have been more than 5 men in the party whose footsteps were tracked. There is nothing to show whether one or two dacoits could have taken a line of retreat outside of the line of tracks followed.

In short the evidence on which the learned Sessions Judge has

NGA PO HNAN v. KING-EMPEROR.

held that there were only 5 dacoits, is not to my mind at all conclusive, considered by itself.

And there are other materials:—There is Po Aung's confession in which he told practically the same story as Appellant. It is true this confession was recorded two days after Po Aung's arrest. But it is doubtful if he could have been taught the story he told in that time, and he was ready to confess when he was taken before the Magistrate immediately on his arrest, and it was only because the Magistrate had no forms, and thought it necessary to wait till he got some, that the confession was not recorded then. And there is the evidence of Paw Tha and Mi E Nu, and other witnesses not very credible perhaps, but still plausible and possibly true, which tends to show that there were more than 5 dacoits.

My conclusion is that it was not satisfactorily shewn that Appellant gave false evidence.

The Government Prosecutor has referred to section 412, Criminal Procedure Code. But I am satisfied that the provisions of that section cannot prevent me from considering the question whether the Appellant forfeited his pardon.

In reality the appeal is not against the conviction but the sentence. Appellant admits his guilt. He contends that he is not liable to any punishment because he obtained a pardon. But of course if the pardon was in force he ought not to have been convicted. I set aside the conviction and sentence and direct that Appellant be discharged.

Criminal Procedure—195, 476.

Criminal Revision No. 477 of 1908. October 30th.

Before D. H. R. Twomey, Esq.

NGA LU PO, NGA PO CHI, NGA YAN WE and NGA TOK } *v.* KING-EMPEROR.

Mr. *C. G. S. Pillay*—for applicants.
Mr. *H. M. Lütter*, Government Prosecutor—for the Crown.

Held,—that section 476, Code of Criminal Procedure, is inapplicable where there has been no judicial proceeding.

Also,—that in a prosecution for an offence under section 182, Indian Penal Code, the burden of proof cannot be laid upon the accused. It is for the prosecution to show that the information given was false, not for the accused to show that it was true.

* *Reference*—
U.B.R., 1907, I, Criminal Procedure, 1.

It is clear that the order written by the Deputy Commissioner on the diary sheet of the Miscellaneous proceedings under the Village Regulation was not an order under section 195, Code of Criminal Procedure, sanctioning a prosecution. As explained in *Paw U v. King-Emperor**, sanction to prosecute is required only when some one applies for it, and as no one applied in this case, the Deputy Commissioner's order was not such a sanction.

The learned Sessions Judge has held, however, that the order was tantamount to a complaint under section 476. He seems to have overlooked the words "in the course of a judicial proceeding" in that section. There was no charge against the accused persons of giving false information or bringing a false charge in the course of a judicial proceeding. It was in executive proceedings under the Village Regulation that the charge was brought or the information given. There had been no judicial proceeding and section 476 was therefore inapplicable. When a public servant wishes to prosecute for one of the offences referred to in section 195, committed before him or brought to his notice otherwise than in the course of a judicial proceeding, his proper course apparently is to prefer an ordinary complaint under section 200, unless some aggrieved person applies for sanction to prosecute, when the public servant may sanction the prosecution under section 195.

In the present case the order of the Deputy Commissioner was clearly not intended to be a complaint to a Magistrate, and was not treated as such. When the Deputy Commissioner's order was communicated to the local officers, they sent for the Thugyi against whom the alleged false information had been given, and told him he must prosecute the four informants. The Thugyi then preferred a complaint against them, under sections 182, 193 and 211, Indian Penal Code. It must be held, I think, having regard to the provisions of section 195, Code of Criminal Procedure, that the Magistrate had no jurisdiction to entertain the complaint, and that the trial and conviction of the four men were altogether bad.

* U.B.R., 1907, I, Crl. Pro., 1.

NGA LU PO
v.
KING-EMPEROR.

In these circumstances it is not necessary to discuss the evidence in detail. But it must be pointed out that the evidence for the prosecuton was by no means sufficient to warrant the charge of giving false information under section 182, Indian Penal Code, on which the four men were convicted. To establish an offence under that section, the prosecution must show, not merely that the accused gave the information, but that it was false and that the accused knew or believed it to be false. A mere denial on oath by the person against whom the alleged false information was given is not sufficient to prove the offence under section 182.

What the Headquarters Magistrate did in this case was to place upon the accused the burden of proving that the information given by them was true, and to convict them because it was held that they had failed to prove its truth. This was entirely wrong.

It is suggested by the Government Prosecutor that the proceedings might be regularized by changing the charge for which the accused persons were tried and convicted from section 182, Indian Penal Code, to section 500, Indian Penal Code (Defamation). In a prosecution for defamation the burden of proving the defamatory words to be true would lie upon the accused. It would no doubt have saved a good deal of trouble if the Deputy Commissioner, instead of couching his order in general terms, had directed that the Thugyi should clear his character by a prosecution under section 500, Indian Penal Code. But I do not think that section 237, Criminal Procedure Code, would justify me in altering the section and maintaining the conviction. The two offences belong to totally different categories, one being a "Contempt of public authority" and the other an offence against a man in his private capacity. The nature of the defence would be different, and it would certainly be unjust to the accused to convict them of defamation without giving them an opportunity of defending themselves against that charge. Moreover, defamation is a more serious offence as it is punishable with two years' imprisonment, while an offence under section 182, Indian Penal Code, is punishable with a maximum term of six months' imprisonment.

On the grounds which have now been set forth, I set aside the convictions under section 182, Indian Penal Code. The sentences have long since expired.

Criminal Procedure—494, 495 (2).

Criminal Revision Case No. 716 of 1908. November 27th.

Before D. H. R. Twomey, Esq.

NGA MAUNG GYI *v.* { NGA LU GALE / MI BWIN.

The words "any such officer" in section 495 (2) of the Code of Criminal Procedure refer only to the "Advocate-General, Standing Council, Government Solicitor, Public Prosecutor, or other officer generally or specially empowered by the Local Government in this behalf" in sub-section (1). It is only these officers who have the power to withdraw from the prosecution with the effect stated in section 494. If an Advocate privately engaged by the complainant and permitted by the Magistrate to appear for the prosecution, withdraws from the prosecution, the effect provided in section 494 does not follow; in other words, the trial proceeds.

Reference—
2 L.B.R., 165, (dissented from).

In a case instituted by complainant under section 406, Indian Penal Code, an Advocate was engaged by the complainant to conduct the prosecution, and on the Advocate's application the Subdivisional Magistrate allowed "the withdrawal of the prosecution" purporting to act under section 495, sub-section (2) of the Code of Criminal Procedure. The accused was thereupon acquitted. I agree with the District Magistrate in thinking that this procedure was wrong, and that the term "any such officer" in section 495, sub-section (2), refers only to the "Advocate-General, Standing Council, Government Solicitor, Public Prosecutor, or other officer generally or specially empowered by the Local Government in this behalf" in sub-section (1). It is only these officers who have the power to withdraw from the prosecution with the effect stated in section 494. If an Advocate privately engaged by the complainant and permitted by the Magistrate to appear for the prosecution, withdraws from the prosecution, the effect provided in section 494 does not follow; in other words, the trial proceeds.

It would be different if the case were a summons case. The complainant could then be permitted to withdraw the complaint under section 248. And even in a warrant case a Magistrate can, under section 259, discharge the accused at any time before the charge is framed, provided that the offence is one that may be lawfully compounded. But in a warrant case which is not compoundable, the trial must proceed even if the complainant does not wish to press the charge, unless indeed the Magistrate finds sufficient reasons for discharging the accused under section 253 (*i.e.*, where the charge appears to be groundless).

It may be noted that a different opinion was pronounced in the Lower Burma case *K.-E.* v. *Aung Nyun** where it was ordered that in a warrant case which was not compoundable (*viz.*, a case under section 354, Indian Penal Code) the accused could be "discharged for want of prosecution," if the complainant wished to withdraw from the prosecution. I refrain from following that ruling as I

*2 L.B.R., 165.

NGA MAUNG GYI v. NGA LU GALE.

can find no authority for it and venture, with great respect, to dissent from it.

In the present case, all the evidence for the prosecution had been recorded and the accused had been examined and charged before the Subdivisional Magistrate passed his irregular order of acquittal. In ordinary circumstances, the proper course would be to set aside the order of acquittal and at the same time direct that the Magistrate should proceed with the trial. But the Magistrate in passing orders remarked that "the case is more or less of a civil nature and though I have charged the accused I consider the case a very doubtful one." A perusal of the record bears out this opinion on the merits of the case which is a dispute between a paddy broker and a miller as to monies advanced by the former to the latter, which the latter has not fully accounted for. I think it may be held that the evidence for the prosecution did not make out a *primâ facie* case of a criminal offence against the accused, and that the Magistrate would have been justified in discharging the accused under section 253, Code of Criminal Procedure.

For these reasons, while setting aside the order of acquittal, I make no order for the further prosecution of the case.

Criminal Procedure—488.

Criminal Revision No. 718 of 1908. 5th January 1909.

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

NGA HLA *v.* MI HLA KYU.

Mr. *A. C. Mukerjee*—for Applicant. Mr. *San Wa*—for Respondent.

Held,—that maintenance does not include children's schooling fees.

References:

45 L.J. Ch., 191; 1 Ch. D., 226.
Stroud's Judicial Dictionary, Ed. 1890, s. v. Maintenance.
U.B.R., 1897—01, I, 106.
Blackstone's Commentaries, Vol. I, Chapters XV and XVI, Kerr's Edition.

On the 9th August 1907 the Headquarters Magistrate made an order directing Applicant to pay Rs. 15 a month for the maintenance of his two daughters, then aged 9 and 5 respectively. Applicant at that time was a clerk at Katha, drawing Rs. 64 a month. Respondent, the mother of the children, alleged a divorce, and made no claim for maintenance for herself. Therefore no enquiry was made with reference to Respondent's position or Applicant's treatment of her.

Thirteen months' later (*viz.*, on the 8th September 1908) Respondent applied under section 489, Criminal Procedure Code, for an increase of the children's maintenance, and the Magistrate (the successor in office of the Magistrate who had made the original order) increased it to Rs. 25.

It is now contended that this new order was wrong, and I am of opinion that it was.

The considerations which appear to have led the Magistrate to make it were (1) that Applicant had wilfully deserted Respondent and was, luckily for him, not paying maintenance for her; (2) that Applicant was now drawing (at Myitkyina) a salary of Rs. 80 with a local allowance of Rs. 24 besides, (3) that the "children are growing older" and the "cost of schooling fees and clothing will be increasing."

The first was quite irrelevant and the Magistrate was not justified even in saying incidentally that Applicant had deserted Respondent, since that question had never been gone into.

On the second point, the local allowance would certainly be designed to counteract high local charges and could not be fairly regarded as an addition to Applicant's means; while an increase of maintenance proportionate to the rise in salary, from Rs. 64 to Rs. 80, would be no more than Rs. 3-12.

I proceed to the third point. The children were in fact a year older being now 10 and 6 instead of 9 and 5. It is not reasonable to suppose that this difference of age could appreciably alter the circumstances of the children within the meaning of section 489, Criminal Procedure Code, so far as regards clothing. The authorities that have been cited give no support to the contention that it could. And as regards schooling, no attempt has been made to show that it comes within the meaning of "maintenance" in section 488, Criminal Procedure Code.

NGA HLA
v.
MI HLA KYU.

I have been at some pains to look for a definition of maintenance. In the English Law it was held, in at least one Chancery case (*Re Breed*)* that "*maintenance and support*" included education.† But the report is not available, and I can find nothing to suggest that "maintenance" by itself has ever been taken to include education. On the contrary, it is to be inferred from Blackstone's treatment of the subject that maintenance and education are regarded as different things (*see* Commentaries, Vol. I, Chapters XV and XVI, Kerr's Edition).

Here in India, none of the numerous High Court decisions dealing with the maintenance provisions of the Criminal Procedure Code remotely suggests that the cost of education is to be allowed for when a Magistrate is fixing the amount payable for the maintenance of children.

I think that when the Criminal Procedure Code provides in a summary way for compelling a man to "maintain" his wife or children in certain circumstances, it is not intended to go further than to ensure to the wife or children food, clothing and lodging (*cf.* the term "Aliments" in Scots Law, *see* Wharton's Law Lexicon, s. v. Aliments).

The proceedings under Chapter XXXVI do not amount to a Civil Suit where the issue is as to the social standing of the wife and the amount of alimony appropriate, or the kind of education children of a person in the father's position ought to receive and the amount, if any, properly payable in schooling fees for them. These are questions beyond the scope of the Criminal Procedure Code (cf. *Nga San* v. *Mi We*)‡.

My conclusion is that no good ground was made out in the present case for adding to the amount of maintenance originally ordered, and if the Magistrate had correctly interpreted the law on the points noted above, he would not have altered it.

The Magistrate's order is set aside and the Respondent's application under section 489, Criminal Procedure Code, is dismissed.

*45 L.J. Ch., 191, I, Ch. D., 226.
†*See* Stroud's Judicial Dictionary, Ed. 1890, s. v. Maintenance.
‡U.B.R., 1897—01, I, 106.

Criminal Procedure—488.

Criminal Revision No. 387 of 1909. August 31st.

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

MI THAING *v.* NGA PO MIN.

Mr. *Tha Gywe*—for applicant.

As long as an order for the payment of maintenance holds good, it deserves to be enforced: and while a Magistrate may, in the exercise of his discretion, refuse to recover an accumulation of arrears, there seems to be no good reason why he should not enforce payment from the time of the new application.

References:

U.B.R., 1902-03, I, Crl. Pro., 3.
4 B.L.R., 29.
I.L.R., 20 Mad., 3.

APPLICANT got an order in 1901 for the payment of Rs. 3 per mensem as maintenance for her child, a son. Respondent paid for some time, but for 3 years and 11 months before the present proceedings were instituted he neglected to pay. Applicant then applied to the Magistrate to enforce payment of the arrears. This was on the 25th March last. Respondent could only say in his defence that Applicant had not asked for payment, and that under the Ruling of this Court in *Nga Po* v. *Mi Myit* * he should not be required to pay the accumulated arrears.

It was admitted that the child was about 9 years of age at the time of the present proceedings.

The Magistrate dismissed the application on the authority of *Nga Po's* case.

It is contended that this was wrong. In support of the application a Madras decision [*Allapichai Ravuthar* v. *Mohidin Bibi*† (1896)] has been cited, where arrears for 55 months and 28 days were held enforceable. This Madras case no doubt was not brought to the notice of the learned Judge who decided *Nga Po* v. *Mi Myit*. But on the other hand it was solely directed to the amount of imprisonment that might be awarded, and did not disucss the question whether it was in accordance with the intention of the Legislature that arrears for a long period should be recovered by the summary procedure provided in section 488 of the Criminal Procedure Code. The view taken in *Nga Po's* case, which agrees with that taken in the Lower Burma case of *Nepean* v. *Mi Kyan*, ‡ appears to me to be sound. I do not, however, see why an application to enforce payment should be dismissed altogether. As long as the order of maintenance holds good, it deserves to be enforced: and while a Magistrate may, in the exercise of his discretion, refuse to recover an accumulation of arrears, there seems to be no good reason why he should not enforce payment from the time of the new application.

Respondent, though duly served with notice, has not appeared and this application has been head *ex-parte*.

*U.B.R., 1902-03. I, Crl. Pro., p. 3.
†I.L.R., 20 Mad., 3. ‡4 B.L.R., 29.

MI THAING
v.
NGA PO MIN.

I set aside the Magistrate's order and direct Respondent to pay 3 months' maintenance, *viz.*, for the months of March, April, and May last:—The Magistrate's order dismissing the application was passed on the 31st May. The Magistrate is directed to proceed to levy the amount, and enforce payment in accordance with clause (3) of section 488, Criminal Procedure Code.

The Magistrate will also understand that there is nothing to prevent the Applicant from applying to enforce payment for succeeding months if the Respondent's neglect to pay should render this necessary.

Criminal Procedure—488.

Criminal Revision No. 576 of 1909. September 20th.

Maintenance.

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

MI MYA *v.* NGA PADON.

Enforcement of arrears.

The circumstances of each case must be considered and an application is not necessarily to be dismissed entirely.

References:
I.L.R. 20 Mad., 3.
4 B.L.R., 29.
Criminal Revision No. 387 of 1909 (unpublished).
U.B.R., 1902-03, I, Criminal Procedure, page 3.

THIS case has been referred by the District Magistrate. Respondent having failed to pay Rs. 2-8-0 a month as maintenance for a child for 27 months, Applicant applied for enforcement of the order.

The Magistrate's attention was drawn to *Nga Po* v. *Mi Myit*,* where the principle to be observed was laid down. But he apparently found himself unable to decide whether he ought to refuse to enforce 27 months' arrears. I think he did not quite correctly apprehend the meaning and effect of *Nga Po* v. *Mi Myit*. What he had to do was to ascertain under what circumstances the arrears came to accumulate, and if there was no good reason why the Applicant should not have applied with greater promptitude, whether it would be equitable and in accordance with the spirit of the Criminal Procedure Code to enforce payment of the accumulation. There was no question of fixing a limit or creating a precedent. In the nature of things no hard and fast rule can be laid down. Each case must be considered on its own merits.

In *Mi Thaing* v. *Po Min*,† where it was sought to enforce payment of arrears for 3 years and 11 months, the child being about 9 years old at the time of this application, I said:

"The Magistrate dismissed the application on the authority of *Nga Po's* case.

"It is contended that this was wrong. In support of the application a Madras decision [*Allapichai Ravuthar* v. *Mohidin Bibi*‡ (1896)] has been cited where arrears for 55 months and 28 days were held enforceable. This Madras case no doubt was not brought to the notice of the learned Judge who decided *Nga Po* v. *Mi Myit*. But on the other hand it was solely directed to the amount of imprisonment that might be awarded, and did not discuss the question whether it was in accordance with the intention of the Legislature that arrears for a long period should be recovered by the summary procedure

*U.B.R., 1902-03, I, Criminal Procedure, page 3.
†————1907-09, Criminal Procedure, 19.
‡I.L.R., 20 Mad., 3.

MI MYA v. NGA PADON.

provided in section 488 of the Criminal Procedure Code. The view taken in *Nga Po's* case, which agrees with that taken in the Lower Burma case of *Nepean* v. *Mi Kyan*,* appears to me to be sound.

"I do not, however, see why an application to enforce payment should be dismissed altogether. As long as the order of maintenance holds good, it deserves to be enforced, and, while a Magistrate may, in the exercise of his discretion, refuse to recover an accumulation of arrears, there seems to be no good reason why he should not enforce payment from the time of the new application.

"I set aside the Magistrate's order and direct Respondent to pay three months' maintenance, *viz.*, for the months of March, April, and May last. The Magistrate's order dismissing the application was passed on the 31st May. The Magistrate is directed to proceed to levy the amount, and enforce payment in accordance with clause (3) of section 488, Criminal Procedure Code.

"The Magistrate will also understand that there is nothing to prevent the Applicant from applying to enforce payment for succeeding months, if the Respondent's neglect to pay should render this necessary."

In the present case the Applicant said that she had not applied earlier because Respondent always promised to pay. It is conceivable that a woman might be induced in this way to refrain from applying to the Magistrate for some time, and it would certainly be inequitable to allow a man to escape from his obligations by a stratagem of the kind.

The Magistrate's record is illegible where it refers to the age of the child. Presumably the child is not able to maintain itself.

But these points the Magistrate omitted to enquire into.

Then supposing that in the circumstances disclosed the Magistrate came to the conclusion that it would not be proper to enforce payment of the whole of the arrears, it was for consideration whether he should enforce payment of any part of the arrears, and, if so, for how many months. In the case of *Nga Po* v. *Mi Myit* and also in that of *Nepean* v. *Mi Kyan* referred to in it, there were special circumstances which made it necessary to dismiss the application entirely. In the latter there had been an order apparently passed under section 489 which had practically cancelled the order of maintenance. In the former the child was now 13 and "probably able to maintain itself." In short, so long a time had been allowed to elapse in both cases that the circumstances had changed, and some further enquiry was necessary before payment could properly be enforced at all.

I set aside the Magistrate's order and direct that he make a fresh order after further enquiry and consideration on the lines indicated in the foregoing remarks.

*4 B.L.R., 29.

Evidence—14, 54.

Criminal Appeal No. 65 of 1908. June 23rd.

Before D. H. R. Twomey, Esq.

NGA PO SO *v.* KING-EMPEROR.

Held—that evidence as to general dishonesty of character is not admissible under the Evidence Act for the purpose of raising a presumption of dishonesty in the particular case under trial.

References :—

Amir Ali and Woodroffe's Law of Evidence, Notes to section 14.

The Appellant, Po So, who has been sentenced to five years' rigorous imprisonment for "lurking house trespass" (section 454, Indian Penal Code) is a man with four previous convictions for theft and house-breaking.

Po So was seen sitting down in the middle room of a *Pôngyi kyaung* at Myingyan, about half past seven in the morning, a time when all the occupants were away on begging rounds except the head *pôngyi* who was lying asleep in another apartment of the *kyaung*. The *Koyins'* boxes containing their clothes and other belongings were in the room where the accused was seen. An *Upazin* returning to the *kyaung* met the accused coming out. Po So shikoed and said he was from Henzada, and had come to ask for food. The *Upazin* detained him, and he was searched. No stolen property was found on him, but he had Rs. 5-0-6 of his own. His explanation of his visit to the *kyaung* is that he had come from Pakôkku by steamer and lost the morning train by which he wanted to go to Lower Burma. He had not enough money, and went into the *kyaung* to beg for food or money. He was sent up for trial because it was suspected that he went on to the *kyaung* to steal. The District Magistrate commenting on the accused's explanation says :—

"According to his own story he started for the station with Rs. 5-4-0, and it is inexplicable why, if that sum was sufficient to take him to his destination, he had not enough after spending 1½ or 2 annas in food, for he must have had food for his journey in any case. If Rs. 5-4-0 only just paid his fare, he should have done his begging for food first and then taken the day train."

But Rs. 5-4-0 is not a large sum for a man starting on a long journey, and having lost the train there seems to be nothing incredible in his allegation that he wanted to supplement his funds. Indeed the prosecution view is not that he had no need to supplement his funds but that he proposed to do so by stealing rather than by begging. It seems very likely that the learned District Magistrate would not have convicted in this case, but for the Appellant's previous convictions. It is admitted that poor people do go into *pôngyi kyaungs* to ask for food and that people go into *kyaungs* unbidden. There is nothing remarkable in a stranger from another town, who has lost his train going into a *Pôngyi kyaung* which is more or less a public resort and practically free to all Buddhists.

It is essential therefore to consider whether the District Magistrate was right or wrong in allowing the previous convictions to influence his judgment. He says "I consider that accused's character is relevant, he admits being an old convicted thief."

NGA PO SO
v.
KING-EMPEROR.

It seems clear that evidence of bad character is not relevant under section 54, Evidence Act, for the purpose of raising a general inference that the accused person is likely to have committed the offence charged. Under that section such evidence can be admitted only by way of reply to evidence of good character. But there is another section, *viz.*, section 14, under which such evidence might conceivably be relevant. The section admits evidence of "facts showing the existence of any state of mind—such as intention, etc., etc., when the existence of any such state of mind, etc., etc., is in issue or relevant."

In the present case the only question is whether Po So's intention was dishonest or not. But the illustrations to section 14 do not support the view that evidence as to the commission of previous thefts by the accused can be admitted for the purpose of determining whether he committed or contemplated theft on a later occasion. It has been held on the contrary in the Calcutta case *R.* vs. *M. J. Vyapoory Moodeliar* (1881) cited in the notes to section 14, Amir Ali and Woodroffe's Law of Evidence, that "we have no right to prove that a man committed theft or any other crime on one occasion by showing that he committed similar crimes on other occasions." Also, illustration (o) explains that when A is tried for murdering B by shooting him, the fact that A previously shot at B is relevant, but the fact that A was in the habit of shooting at people with intend to murder them is irrevalent. So I think it is clear that evidence as to general dishonesty of character is not admissible under the Evidence Act for the purpose of raising a presumption of dishonesty in the particular case under trial. I hold therefore that the District Magistrate erred in relying on the previous convictions as evidence of bad character, and drawing the inference that the Appellant, whose conduct *per se* was not inconsistent with innocence, had the intention of committing theft. The previous convictions were admissible only for the purpose of enhancement of sentence, if the evidence establishing the offence charged were otherwise sufficient.

The conviction and sentence are set aside and the Appellant is acquitted and will be set at liberty.

Evidence—24, 27.

Criminal Appeal No. 189 of 1908. March 2nd, 1909.

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

NGA SAN YA, LU THIT, NGA THI, THA U, NGA KYWIN AND NGA SO *v.* KING-EMPEROR.

Mr. *J.C. Chatterjee*—for 1st, 3rd and 4th appellants.

Confessions excluded where they had been apparently caused by illegal inducement. Section 27, Evidence Act, not a proviso to section 24.

References:

2 L.B.R., 168.
U.B.R., 1892-96, I, 83. } Followed.

Appellants, San Ya, Lu Thit, Nga Thi, Tha U, Nga Kywin and Nga So have been convicted under section 395, Indian Penal Code, of dacoity, at Tôngyaing, on the 10th September last, and sentenced to different punishments from seven years' transportation to two years' rigorous imprisonment and a fine. A 7th man, Aung Gyi, was discharged.

On the date mentioned, after midnight, some seven dacoits attacked the house of Nga Lu Kin at Tôngyaing, beat Lu Kin and his wife and demanded money, and carried off Rs. 282-12-0 in money and other property (bracelets, earrings, rings, etc.).

The question is whether the evidence is sufficient to support a conviction in the case of each of the Appellants. The evidence is of an extremely unsatisfactory character.

There is first evidence of identification of certain of the Appellants as having been among the dacoits. Lu Kin (1P.) and other inmates did not recognize any of their assailants. The only witness on the point is Nga Shan (9P.), a man who has been in jail for theft, and was himself suspected at first of being one of the dacoits.

* * *

Manifestly the evidence of a man of this character, uncorroborated as it is, is worthless.

It is worthy of remark that Lu Kin (1P.) had known Appellant, San Ya, for 20 years.

Next there is evidence of identification of three Exhibits. The first of these is Exhibit 8, a pinchbeck *hmangwin,* or finger ring, obtained in the search of San Ya's house from his wife, Mi Pwa Thit, who was wearing it at the time.

* * *

Mi Pwa Thit claims that it is her own property made for her by one Mi Shwe Le. It is evident that the identification cannot be trusted.

The other two Exhibits are No. 11 (nine gold beads) and No. 16 (five gold beads). No. 11 was given to the police by Mi Ngwe Hnya (17P.), wife of Appellant, Lu Thit, after she had been (illegally)

NGA SAN YA v. KING-EMPEROR.

detained in the headman's house at Tôngyaing for four days. She then made statements as to where the beads came from. She was, she says, detained for five days more at a monastery: and was "kept away from her children for nine nights altogether." This was not contradicted. Before the District Magistrate she still makes statements as to where the beads came from. There is nothing to show that the District Magistrate did anything to disabuse her mind of any impression produced by the illegal pressure put upon her. Her husband had first been prosecuted under sections 109 and 110, Criminal Procedure Code. He was still in jeopardy. I cannot attach any weight to her statements as to the beads. The only fact therefore relating to the beads which is relevant is that they were obtained from Mi Pwa Thit's possession. No. 16 was obtained from the possession of Tha Nyan (25P.), who says that Appellant, Po Thi, gave them to him (in lieu of Rs. 2 which he owed him) on the fifth (?) *Tawthalin lazôk* (14th September 1908). The District Magistrate accepted as admissible the evidence of Po Waing (26P.) as to part of a confession alleged to have been made to this witness about the 6th October in consequence of an illegal inducement. He seems to have thought that section 27, Evidence Act, is a proviso to section 24 as well as to section 26. This is not so. The subject was fully investigated in the Lower Burma case of *King-Emperor* v. *Po Min*.* I entirely concur in the judgment of Sir H. White in that case. The same view had been taken by Mr. Burgess in *San Bwin* v. *Queen-Empress*.† At the outside, all that could be proved was that Appellant, Po Thi, made a statement in consequence of which Tha Nyan was questioned and the beads recovered from him.

* * *

I am unable to find any appreciable value in doubtful evidence of identification of property—evidence, that is, on which it is impossible to hold that the property was taken in the dacoity. Such evidence can neither corroborate any other doubtful evidence tending to prove the guilt of any of the Appellants nor be itself corroborated by such other evidence.

* * *

This exhausts the evidence with the exception of the confessions of Nga Tha U, Nga Kywin and Nga So.

The District Magistrate examined the Subdivisional Magistrate who recorded these confessions, and came to the conclusion that they were voluntary and admissible.

But the circumstances are very strongly opposed to this conclusion. Tha U's confession was taken on the 16th October, after he had been in police custody for 12 days, during which time an illegal inducement was offered to Po Thi, the wives of Lu Thit and Nga Kywin were being illegally detained, and proceedings were being taken against San Ya and Lu Thit and perhaps others of the Appellants for bad livelihood and 10 and 11 days after Nga Kywin and Nga So's confessions were recorded. On the 30th October, when the District

*2 L.B.R., 168. †U.B.R., 1892-96, I, 83.

Magistrate examined the accused, Tha U adhered to his confession. But next day, when the charges were framed, and the accused were called upon to plead to them, Tha U at once retracted, and said that he was not one of the dacoits, that he had been detained in custody for over 15 days and told that if he told the truth,—if not, he would get punished and so he said what he did, and that he confessed to the (District) Magistrate, because he had to return to police custody and was frightened, and that his confession was taught him by the police. It seems to me that this retractation strongly suggests that Tha U had confessed under the influence of some inducement. As soon as he saw that he was to get no benefit from the confession he retracted it. We know that an illegal inducement was offered to Po Thi, and that the wives of Lu Thit and Nga Kywin were being illegally dealt with in order to induce them or their husbands to speak.

In a case of the kind, if an illegal inducement is offered to one of several co-accused, not only is the same thing likely to be done to the others, but the fact is likely to get to the ears of the others and to affect them in the same way, if it does not lead to a sort of competition.

In the language of section 24, Evidence Act, it sufficiently "appears" from the facts that Tha U's confession was caused by an illegal inducement. In other words, it is *apparently* so caused. It is therefore irrelevant as declared in that section, and the question of its truth is immaterial.

Nga Kywin is recorded as having made his confession on the 5th October, the same day on which he was arrested. But his house was searched on the 27th September [see Sub-Inspector Po Cho's evidence (31P)]. The Inspector (32P.) had been enquiring about him and other of the Appellants before this. San Ya and Lu Thit, whose names were coupled with his at this time, were already being prosecuted for bad livelihood on the 24th September (*see* Myoôk Maung Aung Thein's evidence (36P.)]. His wife, as we have seen, was under detention and he was probably in police custody (irregularly) before his formal arrest on the 5th October. *See* the statement of Mi Lôn Tin (19P.). All the circumstances combine to raise the presumption that the confession was caused by an illegal inducement. Like Tha U, Nga Kywin confirmed his confession when examined on the 30th October and, as soon as the charge was framed, pleaded not guilty. But he did not withdraw his confession. He said he was "very frightened of San Ya and Lu Thit, and therefore he went with them."

I hold that the confession recorded by the Subdivisional Magistrate is irrelevant under section 24, Evidence Act. But the repetition of it in the words just quoted, after the charge was framed, does not appear to be open to the same objection.

I do not, however, consider that it is sufficient in itself to support a conviction, and, as the foregoing analysis of the evidence shows, there was no other admissible or creditable evidence whatever to prove Nga Kywin's complicity in the offence. If he had pleaded guilty, the case would be different. But he did not do so.

NGA SAN YA
v.
KING-EMPEROR.

Nga So's case is much the same. He confessed on the 6th October, two days after his arrest. But the circumstances mentioned as indicating an illegal inducement in the cases of Tha U and Nga Kywin more or less apply to him also. Like Nga Kywin, he confirmed his confession when examined on the 30th October; pleaded not guilty next day when he was charged, and did not withdraw his confession. He said, however, that he confessed "to obtain mercy." That seems to give the explanation. Apparently he had been led to believe by some one in authority directly or indirectly that it would be to his advantage to confess. Similar remarks apply. The repetition of the confession after the charge was framed, though not apparently irrelevant under section 24, is not sufficient to support a conviction. Indeed, these repeated confessions of Nga Kywin and Nga So would not have been made at all, if the District Magistrate had taken the view of the confessions recorded by the Subdivisional Magistrate and of the other evidence in the case which I have done, for he would not have framed charges at all. There was in this view no evidence on which charges could be framed.

Further, these repeated confessions were not recorded in the manner prescribed in sections 164 and 364, Criminal Procedure Code. They were merely the Magistrate's summary record of what the accused concerned said in their defence after pleading not guilty. I do not think a conviction can be based on such statements.

It follows from what has gone before that none of the convictions can be sustained.

I set aside all the convictions and sentences and direct that Appellants San Ya, Lu Thit, Po Thi, Tha U, Nga Kwin and Nga So be acquitted of dacoity at Tôngyaing on the 20th September last, and so far as this case is concerned, released.

Excise—3 (1) (j) (k), 48 (1) (d).

Criminal Revision No 424 of 1909. September 14th.

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

V. R. VENKATARAMAN CHETTY *v.* KING-EMPEROR.

Mr. *C. G. S. Pillay*—for applicant.

Mr. *H. M. Lütter*—for the Crown.

Possession of hemp, unless it is one of the three products specified or some preparation or admixture of the same, is not an offence.

Possession to be punishable must be with knowledge and assent.

References:

U.B.R., 1892-96, I, 139, followed.

Lyon's Medical Jurisprudence, 3rd Edition, page 580.

Report of the Indian Hemp Drugs Commission, 1893-94, Vol. I, page 87.

THE Applicant has been convicted under section 48 (1) (*d*), Excise Act, of possessing intoxicating drugs in contravention of section 18, and sentenced to a fine of Rs. 51 which has been paid.

On a search by the Superintendent of Excise a bottle and two tin boxes were found at Applicant's house. They were sent to the Chemical Examiner, whose report was "The contents appear to be a *majum* or sweetmeat prepared with Indian Hemp," It appeared that the preparation whatever it was, had been made for Applicant by a man called on the record "Coopiandi," who said he was a "physician" of 10 years' standing and denied that it contained hemp, *i.e.*, he gave a list of what he said were the (only) ingredients and they did not include hemp. He also stated that he did not inform Applicant what the mixture contained. He supplied it as medicine for stomach diseases and other complaints. The accused (Applicant) said that the Exhibits were a medicine and did not contain hemp.

The first point to be noted is that the Excise Act does not render the possession of hemp punishable, but only the possession of *ganja*, *bhang* or *charas* or any preparation or admixture of the same. *Ganga*, *bhang* and *charas* are the narcotic products of hemp.

On the face of it the Chemical Examiner's report was unsatisfactory. It did not meet the case. It ought to have stated whether the hemp was one of the narcotic products just mentioned; and to speak of *majum* was not enough. Unless *ganja*, *bhang*, and *charas* represent all the parts or products of the hemp plant from which *majum* can be prepared, it is obvious that *majum* might not be an intoxicating drug within the meaning of the Excise Act. Lyon's Medical Jurisprudence is equally wanting in precision (Lyon's Medical Jurisprudence, 3rd Edition, page 580). It does not say from what parts or products of the plant *majum* is made. It is conceivable that *majum* might be made of the seeds which are not narcotic. They are eaten and oil is expressed from them (*See* Report of the Indian Hemp Drugs Commission, 1893-94, Volume I, page 87). There are also the wood or fibre of the thick stalks, and there is the root, and there may be other parts. I do not find in the Report just mentioned anything to show that any edible product is obtained from the thick

V. R. VENKATARAMAN CHETTY *v.* KING-EMPEROR.

stalks, and no other parts are touched upon. But as the seeds are edible it is clear that *ganja, bhang,* and *charas,* though they are the only narcotic products, are not the only parts or products of the plant of which a sweetmeat might be made. It is of course possible that *majum* is always made of one or other of the three. But on this point, as I have said, Lyon is defective. The Hemp Drugs Commission's Report does not, as far as I can find, mention *majum.* Again the Chemical Examiner's Report is defective in not making clear whether any hemp product was definitely found in the Exhibits. What is to be understood by " appear to be a.....sweetmeat prepared with hemp?" Appear to contain hemp? On these grounds it is impossible to hold that the Report as it stands is evidence that the Exhibits contained an intoxicating drug. It is, however, unnecessary to call for further report from the Chemical Examiner or to examine him on commission, as the conviction is bad for another reason.

Possession to be punishable must be possession with knowledge and assent—See *Pin Ye* v. *Q.-E.** The Headquarters Magistrate who tried the case overlooked this point altogether. The Sessions Judge, on appeal, thought that the Excise Superintendent's evidence showed the Applicant to have known that he had a preparation which was prohibited. This must refer to that part of the Superintendent's statement where he said that the accused tried to conceal the Exhibits by covering them with clothes. But the Exhibits were found on the search of Applicant's boxes, and the boxes also had clothes in them. According to the witness, Nga Pu, one of the elders called to witness the search, accused "opened the boxes for" the search party and they "found the Exhibits after the accused had put away some clothes which had been in the boxes."

In face of this statement, which is consistent with probability and the circumstances of the case, it is difficult to see how the Applicant could have tried to conceal the Exhibits by covering them with clothes. If the Excise Superintendent inferred concealment—from the fact that there were clothes on top of the Exhibits in the box—he was not warranted in doing so. His statement, anyhow, is not sufficient to support a finding that Applicant knew he had something prohibited.

I say nothing of this witness's statement as to what Applicant said to him. The Excise Superintendent is a Police Officer, and section 25, Evidence Act, absolutely bars proof of an incriminating statement made by an accused person to a Police Officer. The other evidence in the case did not touch upon the point under consideration. Thus it was not proved that Applicant knew that the Exhibits contained an intoxicating drug. The conviction and sentence are set aside.

The fine is to be refunded.

*U.B.R., 1892-96, I, 139.

Gambling—6, 7, 11.

Criminal Revision No. 126 of 1908. May 5th.

Before D. H. R. Twomey, Esq.

PAW YA, LAW WUN, LAW SEIN, KAN SO, KAW SIN, KAUNG HOK, LAW SHO, ATAT, KYOWA, KAN SE, LAW KYAN YIT, AKYAN, ASEIN, NAW DWIN, KYAUNG HLUT, MAW TEIN, MAUNG PE, SATE, CHAN MYIN, SUN SUN HAW, LAW SHAUNG, WA SHIN HU, LAW YAN, LAW KYON, AYU, E MYAN, KO TIN SAID, SET KAING, SATWA, KYAW SAIK, LAW HU, SET KUN, YI HO, HOK, SET KYAN, HON HLAING, KAUNG YON, AYAT, KO KA, ALON, SAUNG IN, ALAW, MONG TOK, IN KE, AND IN YA *v.* KING-EMPEROR.

Mr. *Tha Gywe*—for applicants.

Mr. *Lütter*—for the Crown.

Held—As ward and village headmen are usually appointed by the Deputy Commissioners after an informal election by house-holders, they are not officials in the same sense as salaried servants of Government, and the mere fact that they are appointed by Government does not disqualify them as witnesses to a search under section 103, Criminal Procedure Code. *Also*—that the existence of obligations, similar to, though wider than those imposed by Chapter IV of the Code of Criminal Procedure on land holders and private individuals, in the case of ward and village headmen does not disqualify them in the matter of searches under the Gambling Act.

References :—

4 L.B., 213.

S.J., L.B., 1, page 378.

Forty-eight persons, all except one being Chinamen, were convicted in this case of playing in a common-gaming house, a Chinese Club in Mandalay, or being there for the purpose of gaming and were fined under section 11 of the Burma Gambling Act.

Mr. Hill, Deputy Superintendent of Police, Mandalay, having received information that the Club was held as a common gaming house, obtained a Magistrate's warrant under section 6 of the Act and raided the club on the night of the 14th September last with a force of police. The only door to the Club was found bolted and had to be forced open. Of the 48 accused persons 46 were admittedly found inside the Club, and among the articles seized in the building were over 30 packs of cards, a good many dice, and apparatus for playing the 12-animal game and "Anidaung." Two other men were said to have run away and were brought before the Magistrate by summons. Over Rs. 200 in cash was seized and certain Chinese account books and writings, which on being examined by Mr. Taw Sein Ko, a Chinese scholar, were found to contain nothing of an incriminating nature.

Mr. Hill says that some of the gambling instruments were found on the terrace roof of the building, and some of the money was found in locked boxes, which are apparently called "Donation" boxes by the Chinamen, but are called "commission" boxes by the prosecution. The police spy, Ye Ge, says that commission levied on the games played at the Club was put in these boxes. A sum of Rs. 90 and some gaming instruments were found in one box. The amount

PAW YA v. KING-EMPEROR.

found in other boxes is not stated. Mr. Hill himself found no money on the mats of the floor of the room where gambling is said to have taken place, and none on the tables.

There is no evidence as to any of the money being found on mats or tables. A pencilled list of articles seized in the raid was made as required by section 103, but this list was not proved at the trial and what the Senior Magistrate in his judgment calls a copy of it, is not a copy, as it does not show (as the original does), where the several articles were found. It is only a partial translation.

Revision is applied for on various grounds. The first is that the accused were prejudiced by having the case tried by the Senior Magistrate, who issued the warrant under section 6. But this ground is waived by the advocate for the applicants, as he is now satisfied that the Senior Magistrate himself expressed unwillingness to try the case and proceeded with it only on the accuseds' Advocate (Mr. Hirji) intimating that he saw no objection.

The second and third grounds are that the convictions rest on the uncorroborated evidence of spies and accomplices. The witnesses called for the prosecution certainly belong to these categories, and the convictions would be bad if they rested only on the statements of these witnesses. But the convictions are mainly based on the presumption arising under section 7 of the Act, and the chief point for consideration is whether the Club was duly entered and searched under section 6. The objection advanced as to the proceedings under section 6 is that the two ward headmen who accompanied the police to witness the search were not "respectable inhabitants of the locality in which the place searched is situate" as contemplated by section 103, Criminal Procedure Code. The question whether a ward headman is a competent "respectable inhabitant" under section 103 has been decided in the negative by a majority of the learned Judges of the Chief Court, Lower Burma, who considered the question in Criminal Appeal No. 411 of 1907 *King-Emperor* vs. *Kwe Haw and* 16.* The learned Chief Justice laid down that "the persons called to witness a search by a police officer or person holding a search warrant must be respectable inhabitants of the locality in which the place to be searched is situate, who do not hold offices to which they may have been appointed by a Government officer, the duties of which include taking part in the prevention or discovery of offences, or bringing offenders to justice," and as the duties of ward headmen include such duties "they are not such persons as the Legislature contemplated should be called as witnesses to a search." Mr. Justice Hartnoll, who concurred in the Chief Judge's opinion, was to some extent influenced by the consideration that the ward headmen in Rangoon are appointed by the Commissioner of Police (instead of being appointed by the Deputy Commissioner as in other towns).

It is a common practice in Upper Burma towns to call in ward headmen and block elders as witnesses of searches, and in view of the decision of the Chief Court it is desirable that the question as to the

* 4 L.B.R., 213.

propriety of this practice should be considered and settled by this Court so far as Upper Burma is concerned. I agree that some limit must be put to the words "respectable inhabitants." It would manifestly be contrary to the intention of the law for a police officer to call in two fellow police officers to witness a search, however respectable they may be. But I think the Chief Court ruling unduly restricts the meaning of the words. The two disqualifications of ward headmen as discerned by the learned Chief Judge are (1) that he is appointed by Government and (2) that he takes part in the prevention and discovery of crime. As to the former disqualification it may be noted that in Mandalay, and probably also in other Upper Burma towns when a vacancy occurs, an informal election is held by the Subdivisional Officer, and the candidate who receives most of the householders' votes is usually appointed, if he appears to be otherwise suitable, *i.e.*, if he is a man of substance, of a good character and intelligence. In theory, at any rate, the ward headman like the village headmen is chosen for his "respectability," the very quality which is contemplated by section 103. It is true that the actual appointment of ward headmen and village headmen is made by the Deputy Commissioner, but they are not officials in the same sense as salaried servants of Government, and their usefulness lies chiefly in the fact that they are spokesmen and representatives of the people in their charge and intermediaries between them and the various Government Departments. In these circumstances, I do not think that the mere fact of their appointment by Government should be regarded as a bar. At the same time if the prevention and discovery of gambling offences were one of the duties of ward headmen, I think that circumstance might properly be so regarded. But the only offences to which their duties directly relate are the serious offences mentioned in section 6 of the Burma Towns Act, and gambling offences are not included among these. Seeing that the Criminal Procedure Code, Chapter 4, imposes on land-holders and even on private individuals the obligation of assisting the police in certain circumstances, I think it is clear that the existence of similar though somewhat wider obligations in the case of ward and village headmen cannot be regarded as disqualifying them in the matter of searches under the Gambling Act.

It is further argued in this case that the ward headmen who witnessed the search belonged to a different quarter of the town and that they were therefore not inhabitants of *the locality*. I am not prepared to agree in the view that "locality" has the restricted meaning of "quarter." The ward headmen in this case were called from a quarter which is about a mile from the place where the search was made. The word "locality" seems wide enough to cover this case.

I must point out that the Senior Magistrate who tried this case committed a serious mistake is not requiring the Burmese lists prepared under section 103, Criminal Procedure Code, to be formally proved, for the purpose of showing that the requirements of the section were duly fulfilled. The lists are filed in the process record, and the Magistrate contended himself with making an incomplete abstract in English. This serious defect might easily have been fatal

PAW YA
v.
KING-EMPEROR.

to the prosecution, for the presumption under section 7 of the Gambling Act arises only when the entry and search are proved to be in accordance wth section 103 of the Criminal Procedure Code. I think, however, that it is not incumbent on me to upset the convictions on this ground, as the finding of the exhibits in the Club house is admitted by the accused persons themselves, and it is in evidence that a list was actually made as required by section 103.

I must also record my opinion that the evidence of at least one of the elders present at the search should be recorded for the prosecution, in order that the regularity of the entry and search may be clearly demonstrated.

Section 6 of the Gambling Act authorizes the seizure of all moneys reasonably suspected to have been used or intended to be used for the purpose of gaming, and section 15 authorizes the forfeiture of such moneys. There is an entire absence of proof as to the circumstances under which most of the money was seized. Mr. Hill's evidence shows that a sum of Rs. 90 was found with instruments of gaming in a box, and it may fairly be suspected that this sum was used or intended to be used for gaming.

But as regards the remainder of the money seized there is on the evidence no special ground for suspicion, and it was therefore not liable to forfeiture. It might have been different if the list of articles seized had been formally proved as it ought to have been.

The use of the disjunctive "or" in section 16 of the Gambling Act is relied upon by the learned Advocate for the applicants as preventing a magistrate from ordering portions of *both* the fines and the money seized to be paid as rewards.

This contention is supported by a Lower Burma Ruling *Queen-Empress* v. *Nga Po and* 2,* and it seems to be correct. Moreover when the section says a portion or a part, it is not admissible to award the whole.

The convictions and sentences are upheld, but it is ordered that only Rs.90 of the moneys seized shall be forfeited and that the balance shall be refunded to the persons from whose possession it was taken.

The Magistrate's order as to the reward is set aside, and it is directed that the sum of Rs. 900 only out of the fines realized shall be distributed as rewards.

*S.J., L.B., Vol. I, 1872—92, p. 378.

Opium—9 (c).

Criminal Revision No. 203 of 1909. June 10th.

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

KING-EMPEROR *v.* NGA PYA GYI.

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

Possession or custody by a servant.

Held—following *Q.-E.* v. *Kyaw Gaung* (U.B.R., 1897—01, I, 232), that a Burman servant in possession of three tolas of opium for his master, a non-Burman was not guilty of illegal possession.

References:
I.L.R., 15 All., 27.
———25 All., 262.
2 L.B.R., 136.
U.B.R., 1897—01, I, 1.
———I, 232.

THE accused Pya Gyi, a Burman, was arrested by an Excise Officer on the road with a packet containing three tolas of Government Excise opium and the "opium consumption book" belonging to one Tan Kon, a Chinaman, on his person. His explanation was that Tan Kon had sent him to buy the opium for him. Tan Kon gave evidence that the accused was his servant, that being ill and unable to go himself he sent the accused to buy the opium for him, through another Chinaman. Apparently this was the true state of the facts. The Magistrate convicted the accused under section 9 (*c*), Opium Act, and fined him Rs. 5, holding that he was technically guilty of illegal possession.

The Magistrate did not cite any authority, but no doubt relied upon Direction 71 of the Directions under the Opium Act.

The District Magistrate has referred the case for the orders of this Court, being of opinion that on the principles underlying section 27, Indian Penal Code, and applied in *Queen-Empress* v. *Bhure,** the accused was not guilty and that the "Directions" under the Opium Act are not legally binding.

The Government Prosecutor has been heard. He supports the view taken by the District Magistrate.

By section 4 of the Opium Act, "no one shall . . . . possess opium except as permitted by this Act . . . . or by rules framed under this Act."

By section 5 the Local Government is empowered, with the previous sanction of the Governor-General in Council, to make rules . . . . "to permit absolutely or subject to the payment of duty or to any other conditions and to regulate" . . . . the possession of opium.

By section 9 a penalty is provided for possessing opium in contravention of the Act or of rules made under section 5.

The rules under section 5 permit in Upper Burma any non-Burman to possess . . . opium not exceeding three tolas in weight which he has bought from a cultivator in a local area in which the cultivation of the poppy-plant is permitted or from Government, or from a licensed vendor (Rule 13).

*I.L.R., 15 All., 27.

KING-EMPEROR v. NGA PYA GYI.

They do not, however, define possession, or touch upon the question of possession by a servant for his master, otherwise described as custody. They do not prohibit possession by a servant for his master unless the servant is qualified to possess on his own account.

The parallel case of possession of arms in contravention of the Arms Act was dealt with in *Queen-Empress* v. *Myat Aung** by Mr. Burgess.

In *Queen-Empress* v. *Kyaw Gaung* † this question in respect to the opium law was practically decided by the same learned Judge.

Both these decisions seem to have escaped the notice of the District Magistrate. They make it unnecessary to discuss the subject at length. *Queen-Empress* v. *Kyaw Gaung* was a case almost precisely like the present one. It was complicated by the quantity of opium being in excess of three tolas. But I am of opinion that the view taken in it on the point now in question is correct, and that the custody of a servant is not such possession as the Opium Act and Rules contemplate. From what has gone before, it will be evident that Direction 71, so far as it seems to imply that possession by a servant for his master is not legal unless the servant is entitled to possess on his own account, goes beyond the Act and Rules, and is therefore not legally binding.

It may be noted that the custody of a mere neighbour was held not to be possession within the meaning of the Opium Act in *Emperor* v. *Gajadhar*,‡ a decision which was followed in Lower Burma in *Mi Pi* v. *King-Emperor*§ (a case under the Excise Act).

It follows from the foregoing that the accused in the present case committed no offence.

I set aside the conviction and sentence, and direct that the fine, if paid, be refunded.

*U.B.R., 1897-01, I, 1.
†*Ibid.*, 232.
‡I.L.R., 25 All. 2,62.
§2 L.B.R., 136.

Penal Code—366, 372.

Criminal Appeal No. 91 of 1906. January 10th, 1907.

Before G. W. Shaw, Esq.

NGA SHWE THWE *alias* MI SHWE THWE *v.* KING-EMPEROR.

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

Held,—(1) where a female minor met a person in the street and went away voluntarily with that person, she was just as much in the possession of her legal guardians when she was walking in the street, unless she had given up the intention of returning home, as if she had actually been in her guardian's house when taken off;

(2) Letting a female minor for a single act of sexual intercourse is not an offence under section 372, Indian Penal Code.

References :—

5 Mad., H.C.R., 473. | 7 W.R., Cr. 98 (62).
4 W.R., Cr., 6. | I.L.R., 24 Mad., 284.
12 Cox, Cr. C., 29.

Appellant Shwe Thwe has been convicted under section 372, Indian Penal Code, and sentenced to seven years' rigorous imprisonment.

The facts are these. On or about the 4th August last, Mi Halima, a Zerbadi girl aged 13, who lived mostly with her grandmother, Mi Chit, but occasionally with her father, Chet Kyi, when on her way back from the shore where she had been to get some clothes, was met by appellant (dressed as a woman) who took her to his house, gave her rice, betel and a cigar and adorned her with a pinchbeck ring and a brass bangle, and finally, in the evening after dark, conducted her to the house of a young Eurasian Engineer named Donald for him to have sexual intercourse with her. Donald found that she had not attained puberty and his efforts to have intercourse with her were unsuccessful, but he paid appellant Rs. 4 for his services. Next day appellant offered Mi Halima to one Myat Sin who, however, refused to have anything to do with her when she said that she was not a prostitute and did not wish him to have intercourse with her. Appellant found fault with her for this and apparently began to chastise her, but she was rescued by a woman, Mi Hla Te, who happened to see what was going on. After staying two or three days with Mi Hla Te, Mi Halima went off in the evening to the house of Tha Byaw, a brothel keeper—why she should have selected him remains a mystery—and told him that appellant had against her will caused her to become a prostitute, and that she wanted to go home. Whereupon Tha Byaw took her to the Police Station.

This recital of the facts is based on the statements of Mi Halima herself, of Donald, Myat Sin, Mi Hnit (who heard what she said to Myat Sin), Mi Hla Te, Tha Byaw and the Sub-Inspector. The only part of it that rests entirely on the statement of Mi Halima is that where it is said that appellant took her to his house and gave her rice, etc., and that it was at his instance that she was offered to Donald and Myat Sin.

NGA SHWE THWE v. KING-EMPEROR.

Appellant states that he did not "call" Mi Halima to his house, that he met her on the road and she went with him of her own accord saying that she wished to earn money as a prostitute.

According to Donald she did not seem to have any objection, but it does not appear that she knew beforehand what she was going to Donald's house for. And it is clear that she did object to "sleep" with Myat Sin, and that she ultimately got Tha Byaw to send her home (through the Police).

Appellant is a pimp and brothel keeper, and I think there can be no reasonable doubt that it was at his instance that the girl went with him and was offered in prostitution.

The question is what offence, if any, appellant committed. The District Magistrate assumed that appellant committed the offence of letting a female minor under 16 to hire for the purpose of prostitution (section 372, Indian Penal Code). But the authorities are against this application of the section. In *Daulat Bi* v. *Shaikh Ali** (1870), Scotland, C.J., said with reference to the possession contemplated by section 373, Indian Penal Code—

"To bring a case within the section, it is . . . . essential to show that possession of the minor has been obtained under a distinct arrangement come to between the parties that the minor's person should be for some time completely in the keeping and under the control and direction of the party having the possession. . . . . The words 'buys' and 'hires' convey that meaning, ... and giving them due effect it seems to me that the associated words 'or otherwise obtain possession' were not intended to do more than include other modes of obtaining the same kind of possession as that of a buyer or hirer . . . . Complete possession and control of the minor's person obtained by buying, hiring or otherwise with the intent or knowledge that, by the effect of such possession and control, the minor should or would afterwards be employed or used for either of the purposes stated, is what the section was intended to make punishable as a crime."

Similarly he held of the correlative words in section 372 that " 'sells, lets to hire or otherwise disposes of' import a complete making over of the possession of the minor to the person buying or hiring."

That was a case where a man was charged under section 373 on the ground that he had sexual intercourse with a minor not hired to him, as Mi Halima was hired to Donald in the present case, by a brothel keeper, but on payment of a pice to the minor herself. And it was held that he could not be convicted under that section because the possession which he got was not the sort of possession contemplated by the section.

There are several other authoritative decisions to the same effect.

If for this reason a man cannot be convicted under section 373 for merely having sexual intercourse with a minor, neither can the brothel

* 5 Mad., H.C.R., 473.

keeper who lets the minor to hire for a single act of sexual intercourse be convicted under section 372, since the kind of possession which he gives is not the kind of possession contemplated by section 372.

It remains to consider whether appellant committed the offence of kidnapping from lawful guardianship, or that of kidnapping or abducting with intent (section 363 and section 366, Indian Penal Code). This is also a question of difficulty. But the principles have been laid down in several decisions of the Indian Courts.

In *Queen* v. *Gunder Singh* * (1865), where a girl 14 years old had run away from her father's house in consequence of ill-treatment on the part of her mother and meeting the accused on the road had engaged herself to work as a coolie in his service, it was held that as she had voluntarily abandoned her house and was running away, and as she was 14 years old, apparently a free agent and not of such tender age as to lead to the supposition that she had strayed from home, she was not under her father's guardianship when she fell in with the accused and, therefore, he did not take her out of such guardianship.

In *Queen* v. *Musammat Waziran* † Oozeerun) (1867) it was held that a child playing about in a public road is still under the lawful guardianship of its parent or relative living close by.

In *Jagannada Rao and another* v. *Kamaraju* ‡ (1900), comparatively a very recent case, the authorities were examined, and it was held that immediate or physical keeping or possession is not necessary. The judgment quoted with approval from *Reg.* v. *Mycock*§ where a girl met the accused in the street and went away voluntarily with him and it was said, "The girl was.....just as much in the possession of her father when she was walking in the street, unless she had given up the intention of returning home, as if she had actually been in her father's house when taken off."

This explains the decisions in the two cases first cited, and is sufficient, I think, for the determinaton in the present case of the question whether Mi Halima was in the keeping of her lawful guardian when appellant took her to his house.

It is evident that she had not left either her father or her grandmother with the intention of not returning, and she must therefore be held to have been in their keeping.

As she was only 14 her consent was immaterial. The intention of the appellant must be inferred from the use he proceeded to put Mi Halima to, when he had got her.

In short, I am of opinion that the facts appearing on the record are sufficient to support a conviction under section 366, Indian Penal Code. The charge has been amended by the addition of a count under section 366, and the accused has had an opportunity of answering it.

The conviction is therefore altered to one under section 366, Indian Penal Code, of kidnapping Mi Halima, a female minor, from the keeping of her lawful guardian, with intent that she might be forced or seduced to illicit intercourse.

The offence was one of a serious character and I see no reason for reducing the sentence. The sentence is therefore maintained.

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*4 W.R., Cr., 6.
†7 W.R., Cr., 98 (62).
‡I.L.R., 24 Mad., 224.
§12 Cox, Cr. C., 29.

Penal Code—34.

Criminal Appeal No. 162 of 1907. September 17th.

Before. G. W. Shaw, Esq.

NGA TUN BAW AND NGA PAW *v.* KING-EMPEROR.

Mr. *C. G. S. Pillay*, Advocate,—for appellants.

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

To render a person liable under section 34, the common intention must cover the act done by all the several persons.

References :—
U.B.R., 1904-06, 1, Penal Code, 33.
1. I.L.B.R., 233.
2. ————125.
3. ————122.
I.L.R., 19, Mad. 483.

Appellants Nga Paw (25) and Tun Baw (20) brothers, and sons of the village headman, have been convicted under section 302, Indian Penal Code, and sentenced to death for the murder of Shwe Wa, by hitting him with sticks, on the 18th March last, at Tawbôkkôn, and so causing injuries from which he died on the 11th May.

It was at lamp-lighting time in the evening, Shwe Wa had been abroad and was returning home, perhaps drunk and quarrelsome. After entering the village gate, and before he got to his house, he was laid senseless on the road-side with a wound on his head and another on his chin. He was admitted to hospital next day, and beside the two wounds just mentioned, he was found to have an abrasion on the left side of the neck and another on the left jawbone. All the injuries were caused by a blunt weapon. On the 3rd May he was discharged from hospital, but was taken back on the 9th and died on the 11th from internal injuries (to the throat) resulting from the blow on the neck.

The first point for determination is whether it was satisfactorily proved that Appellants were the persons who struck the blows.

* * * * *

The defects of the lower Courts' proceedings do not in my opinion substantially weaken the main statements of Shwe Wa which have never varied, *viz.*, that Appellants were the men who struck him, that Tun Baw delivered the first blow on the head, and Nga Paw, the second on the chin or neck.

* * * * *

For these reasons I am of opinion that the lower Court was right in finding that Appellants were the assailants of deceased.

It remains to consider what offence each of them committed.

In finding both the Appellants guilty, and guilty of murder, the learned Sessions Judge has applied section 34, Indian Penal Code, as interpreted in the Lower Burma case of Po Sein *v.* King-Emperor* I have grave doubts whether the decision in that case is quite correct.

I think that it fails to give due weight to the necessary condition that the common intention must cover the act done. This is where the

*1 L.B.R., 233.

NGA TUN BAW v. KING-EMPEROR.

Madras case quoted (Queen-Empress *v.* Duma Baidya)* differs. It is clear to my mind from the language of the last mentioned decision, that section 34 was in the minds of the Judges, and I think their interpretation of the section is the right one.

Mayne's commentary, paragraphs 243 and 244, agrees with this view (Mayne's Criminal Law of India, 3rd Edition).

When the section speaks of "an act" being "done by several persons," it seems to contemplate the case where more than one person shares in the doing of the act, and it is necessary to bear in mind the definition of "act" given in section 33 and also the provisions of sections 35, 37 and 38. The meaning is more readily apprehended in examples.

(1) **A** and **B** form the intention of causing death or injury sufficient in the ordinary course of nature to cause death to **C** (murder, section 300, Indian Penal Code). In pursuance of that intention they each deliver a blow. Death is caused by **A**'s blow. The whole assault is the act referred to in the section, and it is said to be done by several persons because more than one shares in the doing of it. **B** as well as **A** is responsible for the whole as if he had been the only actor, because it was done in furtherance of the common intention, and he took part in it. In other words he is guilty of murder as well as **A**.

(2) **A** and **B** form the intention of causing grievous hurt to **C**. In furtherance of that intention each delivers a blow. **A** in delivering his blow intentionally causes injury sufficient in the ordinary course of nature to cause death. **C** dies from this injury. Here the whole assault is the act referred to in the section, and it is said to be done by several persons because more than one took part in it. But the intentional causing of injury sufficient in the ordinary course of nature to cause death was not done in furtherance of the common intention, the common intention being only to cause grievous hurt. Therefore while **A** is guilty of murder **B** is not liable under this section to the punishment for murder.

(3) **A** and **B** form the intention of causing grevious hurt to **C** Each in pursuance of this intention delivers a blow without intending to cause death (culpable homicide, section 299, and murder, section 300) or to cause injury likely to cause death (culpable homicide) or injury sufficient in the ordinary course of nature to cause death (murder). **A** accidentally hits a vital part and causes death. **B**'s blow causes simple hurt. Neither **A** nor **B** is guilty of more than voluntarily causing grievous hurt. But both are liable for that offence under section 34.

In applying these considerations to the present case we have to see first what the common intention of the Appellants was. Unless this was to cause death or injury sufficient in the ordinary course of nature to cause death, neither of the Appellants could be convicted of murder merely on the strength of section 34.

The common intention as well as the intention of each individual has to be inferred from all the circumstances disclosed. The material

*I.L.R., 19 Mad., 483.

is meagre. There is the deceased's account of the quarrel at the gate. This was a very petty quarrel. Then there is the fact that Appellant, Tun Baw, struck one blow on the head which caused a contused wound down to the bone but not exposing it, and that Appellant Nga Paw struck one blow on the chin. According to the medical evidence the injury to the neck may have been caused by the same blow. Presumably the abrasion on the left jaw was similarly caused. When a matter of the kind is doubtful, the accused is entitled to the benefit of it. This blow however was a very severe one, and considerable force must have been used. It was probably aimed at the head. It is not usual to aim at a man's chin or neck. It was probably an accident that the blow struck the chin and neck. The fatal result which actually ensued could hardly have been contemplated at all. There is no evidence as to the size and weight of the sticks that were used, or as to the way they were used.

Sir C. Fox's remarks in the Lower Burma case already cited in reference to a blow on the head must be taken to have been modified later on fuller consideration in Shwe Hla U *v.* King-Emperor * and Shwe Ein *v.* King-Emperor †. I concur in the view expressed in the later cases, and have already followed them in Naban *v.* King-Emperor‡.

It cannot always be assumed that when a man strikes a blow on the head, he intends to cause death or injury sufficient to cause death (murder, section 300, Indian Penal Code), or even injury likely to cause death (culpable homicide, section 299).

On these facts I am of opinion that the Appellants cannot be held to have had the common intention to do anything more than cause grievous hurt or injury which they knew to be likely to amount to grievous hurt (section 322, Indian Penal Code). But I think that it may reasonably be inferred that they had this intention.

In the same way I do not think that Nga Paw can be held to have intended when he struck his blow to have had the intention to cause more serious injury.

Appellant Nga Tun Baw actually caused no more serious injury than simple hurt as far as the evidence shows. But under section 34 on the principles above explained, he is liable for voluntarily causing grievous hurt.

I alter the convictions to convictions under section 325, Indian Penal Code, and reduce the sentences to five years' rigorous imprisonment.

*2 L.B.R., 125. †3 L.B.R., 122. ‡U.B.R., 1904-06, I, Penal Code, 33.

Penal Code—178.

Criminal Revision No. 496 of 1907. July 9th.

Before G. W. Shaw, Esq.

NGA PYO *v.* KING-EMPEROR.

Mr. *Tha Gywe*—for applicant.

Held—a witness in a Civil case is entitled to payment of his expenses before he gives evidence. If he is not paid he is not bound to appear at all in answer to the summons, and it is no offence to refuse to give evidence on the ground of insufficient payment of expenses before the Judge has decided that the payment made was sufficient.

Applicant was convicted under section 178, Indian Penal Code, and sentenced to pay a fine of Rs. 10 or in default to undergo seven days' rigorous imprisonment.

I do not think that he was quite fairly treated. Both the Judge of the Township Court and the Subdivisional Magistrate were evidently imperfectly acquainted with the provisions of the law bearing upon the case. A witness in a Civil case is entitled to payment of his expenses according to section 160, Civil Procedure Code, before he gives evidence.

If he is not paid he is not bound to appear at all in answer to the summons. (*See* the explanation to section 174, Civil Procedure Code.) And if he does appear the Court may discharge him without requiring him to give evidence, (*See* section 162.)

The accused was perfectly entitled to represent to the Judge that he had not been properly paid, and on that ground to refuse to give evidence.

It was then the business of the Court to decide whether he had been duly paid, and the Court did this. The accused was then bound by the Court's decision.

The proceedings are defective in failing to show whether the accused still refused to give evidence after that decision. I do not think this can be inferred either from the Township Judge's report or from the proceedings before the Magistrate

If the Township Judge had followed the procedure laid down in sections 480 and 481, Criminal Procedure Code, or that laid down in section 484, Criminal Procedure Code, the statement of the accused would be on the record and there would be no doubt as to the facts.

As it is, I do not think that the applicant's plea of guilty can be accepted. It is not at all clear that the offence was correctly stated to him. It was no offence to refuse to give evidence in the first instance on the ground of insufficient payment of expenses before the Judge had decided that the payment made was sufficient; and it does not appear that applicant refused to give evidence after the Judge had decided to that effect.

In the circumstances, the Judge, if there really was cause for proceeding against applicant, ought to have followed sections 480 and 481, Criminal Procedure Code. It might then have happened that applicant would have apologised, and the Judge could have discharged

NGA PYO
v.
KING-EMPEROR.

him or remitted the punishment under section 484, Criminal Procedure Code.

If, however, there were any special reasons why the Judge should send the applicant before a Magistrate, then as I have said, he should have proceeded under section 482, Criminal Procedure Code, or section 476, Criminal Procedure Code, and the Magistrate ought at once to have taken cognizance on the Judge's complaint.

The Subdivisional Magistrate (and the District Magistrate too) were entirely mistaken in supposing that sanction was required. It is only necessary to read clause (*a*) of section 195 (1), Criminal Procedure Code, to see that. The complaint of the public servant concerned, in this case of the Judge of the Township Court, was all that was necessary.

As it does not appear that applicant committed any offence, the conviction and sentence are set aside and the fine is to be refunded.

Penal Code—361, 363.

Criminal Revision No. 520 of 1907. August 29th.

Before G. W. Shaw, Esq.

NGA TE HLA *v.* KING-EMPEROR.

Advocate for applicant—Mr. J. N. Basu.

Where a female minor, by preconcerted arrangement with the accused left the house of her parents of her own accord, intending not to return, and met the accused at a place appointed and eloped with him willingly.

Held—that the accused was an active participator in the minor's leaving her parents' house, and therefore was rightly convicted of kidnapping from lawful guardianship.

References :—
U.B.R., 1907, I, Penal Code, 1.
1 L.B.R., 205.

The facts of this case are that Mi Shwe Hlaing, a girl of 13, living with her parents, fell in love with the Applicant and, by arrangement with him, left the house and met him at a place appointed, went away with him and lived with him as his wife. She was traced, and recovered at 9 o'clock on the night of the same day, the elopement having taken place early in the morning. Applicant, who is a lad of 16, has been convicted under section 363, Indian Penal Code, of kidnapping a minor from lawful guardianship and sentenced to six months' simple imprisonment.

It is contended on his behalf that there was no evidence to show that Applicant took an active part in the elopement, that when she left the house the girl had no intention of returning, and therefore she could not be said to be in the keeping of her parents at the time when she met the Applicant.

The reference is to *Shwe Thwe* v. *K.-E.** and the decisions there cited, from which it is said the present case is distinguishable.

The only Ruling in Upper or Lower Burma which seems to bear directly on the point is *The Crown* vs. *San Hlaing*,† where a Bench of the Chief Court held that an accused may be guilty of kidnapping a minor from lawful guardianship, where there is no evidence of the accused having in any way enticed the minor away, and where the evidence is that the minor of her own motion left her guardian's keeping and proposed elopement to the accused, and went with him of her own free will. That was a case where the girl went to the bazaar and there met the accused, and at her own request went with him to another village—on conjugal terms.

It does not appear whether any arrangement had been made before the girl left her parents' house, or whether, when she left the house, she did so with the intention of not returning. The view which the learned Judges apparently took was that she had not decided not to return when she left her parents' house, and was therefore still in their keeping at the time she met the accused.

* U.B.R., 1907, I, Penal Code, p. 1. † 1L.B.R., 205.

NGA TE HLA
v.
KING-EMPEROR.

The present case differs in that, as far as the material available enables me to form a definite opinion, the girl left the house with the intention of not returning. She was being pressed by her mother to marry a man she did not like, and also, as she says, being illtreated.

But on the other hand there is another circumstance which appears to me to be fatal to the Applicant's case. The girl states, and the Applicant also admits, that the meeting and elopement were arranged beforehand. In short, the Applicant was an active participator in her leaving her parents' guardianship, and it is not a case where the girl had already left her parents' guardianship before the elopement was arranged. The facts appear to resemble those of the English case of *Reg.* v. *Mankletow*, quoted by Mayne (Criminal Law, 3rd Edition, paragraph 472).

In the circumstances I have no hesitation in holding that the Applicant *took* the minor out of her parents' guardianship within the meaning of section 361, Indian Penal Code.

With reference to the punishment, I am of opinion that it was unnecessarily severe. The parties are pônnas. The intention was marriage. The girl is now living with the Applicant as his wife, at his mother's house. Finally, as I have already said Applicant is only 16 years of age.

He had undergone a month's imprisonment already when the present application was preferred : and nearly three weeks more must have elapsed before he was released on security.

I consider that, under the circumstances before mentioned, the Applicant has already been sufficiently punished.

I maintain the conviction and reduce the sentence to the imprisonment already undergone.

Penal Code—406.

Criminal Revision No. 863 of 1907. January 16th, 1908.

Before G. W. Shaw, Esq.

SHUDUTHROY BISSESHURDAS *v.* AGAMA MISTRY.

Mr. *A. C. Mukerjee*, Advocate—for Applicant.

Where the alleged facts were that the accused hypothecated to the complainant by a written contract, all his claims as a contractor against Government in respect of work done and materials supplied to the Executive Engineer, and undertook regularly and without fail to convey and make over to Applicant all cheques drawn by the Executive Engineer in his favour and subsequently, in violation of the said contract, cashed two such cheques and appropriated the proceeds.

Held—that these facts constituted Criminal Breach of Trust.

References—

5 W.R., Civil 230.
Ghosh, Law of Mortgage, 3rd Edition, page 145.
U.B.R., 1902-03, Penal Code, page 9.
Mayne's Criminal Law, 3rd Edition, Part II, paragraph 534.

The Applicant laid a complaint before the Subdivisional Magistrate of criminal breach of trust against Respondent. The allegations were to the effect that Respondent, to secure a debt of Rs. 1,000, by a written contract hypothecated to Applicant all his claims as a contractor against Government in respect of work done and materials supplied to the Executive Engineer, and undertook "regularly and written contract hypothecated to Applicant all his claims as a contracdrawn by the said Executive Engineer in his favour, to "hold the same unto and to the use of" the Applicant, and "not under any circumstances to cash any bill or cheque or otherwise appropriate the proceeds thereof without the knowledge and consent of" Applicant, etc., and that Respondent cashed two cheques aggregating Rs. 1,002-4-5 and misappropriated the proceeds in violation of this contract. The Subdivisional Magistrate dismissed the complaint doubting if there "could be a trust when the property pledged is not in the possession of the mortgagor."

The District Magistrate "saw no reason to direct further enquiry," but did not record anything to explain his view of the case.

Apparently the Subdivisional Magistrate thought that the Respondent could not be said to have been entrusted with the cheques, because at the time of the contract they were still in possession of the Executive Engineer or had not come into existence. But his meaning is not very clear.

There was certainly nothing to prevent the parties from making the contract they did, *cf.* sections 5 and 6, also sections 3 (definition of actionable claim) and 134 of the Transfer of Property Act. That Act of course is not in force in Upper Burma, but the general principles of law contained in the sections cited are—

As to whether the facts alleged by Applicant would constitute criminal breach of trust, we have to see what section 405, Indian Penal Code, says:—"whoever being *in any manner* entrusted with property, or with any dominion over property, dishonestly misappro-

SHUDUTHROY BISSESHURDAS v. AGAMA MISTRY.

priates or converts to his own use that property, or disposes of that property in violation . . . *of any legal contract* . . . . which he has made touching the discharge of such trust . . . commits criminal breach of trust".

There can be no doubt that if the Respondent made the contract alleged, and disposed of the cheques as he is alleged to have done, he converted the proceeds of the cheques to his own use, in violation of the legal contract he had made touching the manner in which he was to deal with them. It is then necessary to consider whether there was a trust within the meaning of the section. If there was, then the Respondent clearly acted dishonestly (section 24, Indian Penal Code), and was guilty of criminal breach of trust. Mayne says "a *trust* may be defined, as any arrangement by which one person is authorized to deal with property for the benefit of another" (Criminal Law, 3rd Edition, Part II, paragraph 534).

This certainly in my opinion covers the actions imputed to Respondent in the present case. For he mortgaged (hypothecated) his claims on the Government, and was bound by his contract to "hold the cheques unto and to the use of" the Applicant, and not to cash them or appropriate the proceeds without Applicant's knowledge and consent, but to "convey and make them over" to the Applicant.

Mayne further says, quoting the language of several decisions, "where the trust and the breach of it are both made out, it would be no answer to a charge under these sections that the accused had an interest in the property, provided it was not an interest which justified his mode of dealing with it. There is nothing to prevent one partner being convicted under section 405 of criminally misappropriating the partnership property. So a mortgagor in possession who wilfully incurs arrears of Government revenue and allows the property to be sold, and then purchases it *benami*, with the object of holding it free of the claim of the mortgagee, has committed an offence under the same section. And conversely, where property has been pledged to another, who then makes use of or deals with the property, he will be guilty of breach of trust according as he is justified in his acts by the terms of the pledge, and if not justified, according as his conduct is dishonest."

The case of the mortgagor in possession is *Ram Manik Shaha* v. *Brindaban Chandar Potdar** where the learned Judges said, "we are disposed to think that the mortgage being in an English form, and the property being in point of law in the mortgagee, and the mortgagors, and particularly Ram Manik being in possession, he was entrusted by the mortgagee with the dominion over property." That was a Calcutta case of 1866.

We are not in Upper Burma bound by the distinctions of English law†. For us a mortgage is simply a transfer of an interest in property, and where, by the contract, possession remains with the mortgagor, and it is laid down how he is to deal with the property for the

*5 W.R., Civil 230. †See Ghosh-Law of Mortgage, 3rd Edition, p. 145.

benefit of the mortgagee, it appears to me that he is entrusted with the property to the extent of the mortgagee's interest in it, just as much as if the mortgage had been "an English mortgage." The view which my learned predecessor took of the law in *Set Shwin* v. *King-Emperor* * is consistent with this conclusion. He said "one cannot commit criminal breach of trust with reference to one's own property, unless it has been assigned to another." In that case a debtor had made an agreement by which he undertook to carry on his business as before, but to devote the proceeds of the sale of his merchandise in the first place to the payment of his debts by instalments, but there was no assignment of his property to the creditors. On this ground it was held that no offence of criminal breach of trust was committed when the debtor used the proceeds of the sale of his merchandise for his own purposes.

The present case differs in that there was an express assignment, reduced to writing in an elaborate document drafted by a lawyer.

For these reasons I hold that the alleged facts constitute the offence of criminal breach of trust, and direct that the Subdivisional Magistrate make further enquiry into the case. The Respondent was served with notice but failed to appear and contest the present application.

*U.B.R., 1902-03, I, Penal Code, p. 9.

Penal Code—265, 266.

Criminal Revision No. 531 of 1908, 15th September.

Before D. H. R. Twomey, Esq.

KING-EMPEROR *v.* MI YA PYAN.

Held,—that where standard weights are not prescribed no presumption of fraud can arise in respect of short weights, and a conviction under sections 265, 266, Indian Penal Code, cannot be obtained unless the element of fraud is strictly proved.

The record of a summary trial should show that the law has been complied with. The record in this case does not show that the Headquarters Magistrate kept before his mind the consideration that fraud is a necessary constituent of offences under section 264, 265, or 266, Indian Penal Code. There is nothing to show that the accused used or intended to use the weights fraudulently, *i.e.*, as being equivalent to standard weights or any other weights. Standard weights are prescribed in Rangoon and certain other large Municipal towns [under section 142 (*o*) of the Burma Municipal Act, 1898]. It is also provided by Municipal byelaws in force in certain towns that the weights and measures used in the Municipal bazaars shall conform to certain weights and measures furnished by the Municipal Committee. Where such weights are prescribed, a bazaar seller would no doubt be bound to take reasonable care that the weights used by him are not defective according to the standard, and if any of his weights varied from the standard so as to give the seller a substantial advantage, the Court would probably infer fraud. But where no standard is prescribed it is clear that no presumption of fraud can arise, and a conviction under sections 265, 266, Indian Penal Code, cannot be obtained unless the element of fraud is strictly proved. In the present case it appears that the weights in question were compared by the bazaar gaung with certain others which are referred to as "correct" weights. But there is nothing to show that the latter were furnished by the Municipal Committee as correct or generally recognized by traders as standard weights for the bazaar. "Correct" is a relative term and is meaningless where there is no standard to refer to, whether a standard prescribed by lawful authority or generally recognized by local custom.

As no fraudulent intent was alleged, proved, or admitted in the present case the plea of guilty must be disregarded. The conviction is set aside and the fine will be refunded.

Penal Code—182.

Criminal Revision No. 477 of 1908. October 30th.

Before D. H. R. Twomey, Esq.

NGA LU PO, NGA PO CHI, NGA YAN WE AND NGA TOK
v. KING-EMPEROR.

Mr. *C. G. S. Pillay*—for Applicant.

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

Held,—that section 476, Code of Criminal Procedure, is inapplicable where there has been no judicial proceeding.

Also, that in a prosecution for an offence under section 182, Indian Penal Code, the burden of proof cannot be laid upon the accused. It is for the prosecution to show that the information given was false, not for the accused to show that it was true.

See Criminal Procedure, page 13.

Penal Code—406.

Criminal Revision No. 725 of 1908. 7th January 1909.

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

H. A. L. GIRSHAM, ATTORNEY OF A. DEWAR *v.* MUTUSAMY.

Mr. *C. G. S. Pillay*—for Applicant.

Failure to account for money entrusted may be sufficient ground for a charge of criminal breach of trust.

References:
I.L.R., 9 All., 666 (dissented from).
U.B.R., 1904-06, I, Penal Code, 19.

Respondent was acquitted by the Subdivisional Magistrate on a charge of criminal breach of trust (section 406, Indian Penal Code) in respect of Rs. 4,916.

The Magistrate, in the end, came to the conclusion he did without hearing the defence, and on a reconsideration of the evidence for the prosecution and the accused's statement. He was influenced apparently by the decision of Mr. Justice Mahmud in *Queen-Empress* v. *Murphy*.*

The applicant who was the informant in the case seeks the intervention of this Court in Revision.

Respondent was admittedly entrusted with Rs. 15,730 by one Dewar, the Applicant's principal, to lend out at interest on Dewar's behalf, and admittedly he rendered an account of Rs. 10,814 only, and after saying at first that he could not account for the balance of Rs. 4,916, promised to render an account within a month to Applicant's satisfaction, but failed to do so up till the time the present proceedings were instituted, *i.e.*, four months from the date of his promise.

In his information to the police, Applicant said that, instead of rendering account, Respondent was avoiding him and was said to be about to abscond, and (therefore) Applicant charged him "with offences punishable under sections 406 and 409, Indian Penal Code," *i.e.*, with criminal breach of trust in respect of the Rs. 4,916 for which he was unable to account.

Following *Queen-Empress* v. *Murphy*, the Subdivisional Magistrate was of opinion that what Applicant wanted was merely an account, and on the ground that "throughout the prosecution no statement is made to the effect that accused had dishonestly misappropriated the Rs. 4,916" he found that "the facts alleged" do not consitute criminal breach of trust.

I am unable to accept this view, and I venture to doubt the correctness of the decision in *Queen-Empress* v. *Murphy*. In that case the complaint alleged that the accused admitted having received Rs.350 and interest at 12 per cent. on Rs. 600 on account of the complainant, and as he had failed to account for the same, it charged him with "having dishonestly misappropriated the said money and committed criminal breach of trust in respect thereof."

*I.L.R., 9 All., 666.

H. A. L. GIRSHAM v. MUTUSAMY.

In face of that plain statement, it is difficult to see how the learned Judge could have been of opinion that there was "no allegation in the complaint that the money had, as a matter of fact, been realized by the accused," and "no allegation that the money so realized was wrongfully appropriated to his own use."

The present case is equally plain.

In a case of the kind where money is entrusted for a particular purpose, the owner cannot know that it has been misappropriated until the person to whom it has been entrusted fails to account for it. On the other hand, when the latter fails to account for the money entrusted to him, the owner naturally comes to the conclusion that he has dishonestly misappropriated it. Whether a Civil Suit for account does or does not lie, and whether the complainant or informant has or has not been led to institute criminal proceedings, merely because he has not got an account, are immaterial. The question is whether the facts constitute the offence defined in section 405, Indian Penal Code.

As observed in *Nga Tha Zan* v. *King-Emperor*,* dishonest misappropriaton may sometimes be inferred from the circumstances without direct evidence. Many facts have to be proved in that way in a court of law (*cf.* the definition of "proved" in section 3 of the Evidence Act). In the present case I think that the Magistrate was right in framing a charge and calling upon the Respondent for his defence, he was misled by *Queen-Empress* v. *Murphy*, and did not correctly interpret the law.

The Respondent has had an opportunity of showing cause, and is quite willing to have the case reopened.

I set aside the order of acquittal, and direct that the Magistrate proceed to take evidence for the defence and come to a fresh decision by the light of the foregoing remarks.

*U.B.R., 1904-06, I, Penal Code, page 19.

Penal Code—188.

Criminal Revision No. 188 of 1909. May 13th.

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

YAUNG HON BY A YIN *v.* KING-EMPEROR.

Mr. *S. Mukerjee*—for Applicant.

Held,—that disobedience of an order issued under section 268, Civil Procedure Code, 1882, (O. XXI, r. 46, Schedule I, Civil Procedure Code, 1908) is not punishable under section 188, Indian Penal Code.

Reference:

I.L.R., 6 Cal., 445

THE Applicant, A Yin, has been convicted under section 188, Indian Penal Code, and sentenced to pay a fine of Rs. 30, or in default to suffer seven days' simple imprisonment.

The order which he was held to have disobeyed was one which ought to have been, and no doubt was intended to be, a prohibitory order in Form 139, Schedule IV, issued under section 268 of the Civil Procedure Code, 1882, (corresponding to O. XXI, r. 46 and Form Appendix E, No. 17, of the Code of 1908). Actually, for what reason does not appear, the order was in Form No. 142, the form prescribed for cases falling under section 272.

The Applicant was agent of Young Hon, a Public Works contractor, and the order was issued at the instance of B. Mukarji (a Decree-holder), who wished to attach in execution of decree a debt which he alleged to be due from the Applicant to La Saing, his Judgment-debtor.

The only question which it is necessary to go into here is, whether, supposing the Applicant to have disobeyed a prohibitory order issued under section 268 of the Civil Procedure Code of 1882, he was liable to conviction under section 188, Indian Penal Code.

On the face of section 188, I think it is clear that it was not intended to apply to an order of this kind, and I am unable to see how it could be shown that disobedience of a prohibitory order issued under section 268 of the Code of Civil Procedure, either caused or tended to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any persons lawfully employed, or caused or tended to cause danger to human life, health or safety, or caused or tended to cause a riot or affray. It is almost absurd to suppose that it could have any such consequence, and it need hardly be said that no attempt whatever was made to prove anything of the kind in the present case. On this ground alone the conviction would have been bad.

But there is more to be said. As pointed out by Mayne in his Commentary in section 188, it was held (by Sir R. Garth, Chief Judge of the Calcutta High Court) in *In the matter of the petition of Chandrakanta De*,* as long ago as 1880, that section 188 does not apply to orders in Civil Suits between party and party, and there has been no decision to the contrary since, as far as I am aware.

*I.L.R., 6 Cal., 445.

YAUNG HON v. KING-EMPEROR.

Moreover, in section 136 of the Code of 1882, it was provided that disobedience of an order under Chapter X relating to discovery and the production, etc., of documents, *should be deemed to be* an offence under section 188, Indian Penal Code. Such a provision would have been unnecessary if the disobedience already amounted to an offence under section 188.

It may be noted that in the Code of 1908, O. XI, r. 21, which corresponds to the old section 136, omits the clause referring to section 188, Indian Penal Code. The explanation is probably to be found in the fact noted by Amir Ali and Woodroffe in their notes to O. XI, r. 21, that the punishment provided independently of section 188, Indian Penal Code, is of a highly penal character. If the offender is the Plaintiff he may have his suit dismissed; if the Defendant, his defence may be struck out. No doubt the Legislature has come to the conclusion that this is sufficient provision for disobedience.

Another instance may be cited from the Code. By section 493 of the old Code (corresponding to O. XXXIX, r. 2, of the Code of 1908) a special punishment is prescribed for disobedience of a temporary injunction.

A similar remark applies. If section 188, Indian Penal Code, could be brought to bear on orders made by a Civil Court between party and party, it would have been unnecessary to provide a special punishment for disobedience of injunctions.

An attachment differs from the instances mentioned, in that it carries its own sanction. When an attachment has been made, any private alienation of property, or payment of a debt, etc., etc., *is void* (section 276, Civil Procedure Code, 1882, corresponding to section 64 of the Code of 1908).

This no doubt explains why no special punishment is provided for alienation of attached property (including the payment of debts in contravention of a prohibitory order).

As Sir R. Garth in the case above cited referred to committal for contempt, it may be well to say that while the Chartered Indian High Courts have the power of attaching and committing for contempt, under their Letters Patent, other Courts in India, subordinate Courts at least, appear to have no such power. Section 151 of the new Code of Civil Procedure can hardly be taken to change the situation in this respect. If, therefore, in the present case the Applicant was directed by a prohibitory order issued under O. XXI, r. 46, not to pay a debt to any one whatsoever, and disobeyed that order, the only penalty is that he is still liable for the amount.

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

Criminal Revisio No. 201 of 1909. June 15th.

Penal Code—447.

Criminal Trespass.

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

KING-EMPEROR *v.* NGA U THIT.

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

Held,—that driving a cart over Government waste land in respect to which the Municipality had put up notices prohibiting cart traffic, did not amount to criminal trespass.

References :

5 Mad., H.C.R., App. 38.
————App 17; Weir, 3rd Ed., pp. 310, 311, 316.
Ratanlal's Unreported Criminal Cases, 1862—1898, p. 393.

THE accused, Nga U Thit, was convicted of criminal trespass under section 447, Indian Penal Code, and fined Re. 1 or in default one day's rigorous imprisonment for driving a loaded cart across a piece of open ground said to be Government waste land, and to be used as a play-ground by the boys of the High School. The Municipality had stuck up printed notices in Burmese forbidding people to drive carts across the ground, and the Municipal Secretary was the complainant. There is nothing to show that the public have right-of-way over the ground. On the contrary, the presumption is, that they have not. Hence the ground is not a " street," as defined in section 2 of the Municipal Act, and is not vested in the Municipal Committee as such under section 78 (*g*) of that Act.

It does not appear that the Government has transferred the land to the Committee for local public purposes under section 78 (*f*). This being so, trespassing on the land in defiance of the Municipal notices would not appear to involve any of the intentions necessary to constitute the offence of criminal trespass (*cf.* the Madras anonymous cases Nos. 140 and 151 of 1870*—cases almost identical with the present one).

If the Government itself had issued such notices, the intention to commit the offence of disobeying the orders would presumably be inferable (*cf.* the Madras anonymous case No. 67 of 1869,† where the Sub-Collector was authorized to order land not to be cultivated, and the accused entered upon the land to cultivate it in defiance of the Sub-Collector's order; and contrast the anonymous cases No. 44c of 1869‡ and No. 189 of 1882,§ where no orders had been issued).

It has been held that land, the property of Government, must be taken to be in the possession of the local Government officers on behalf of Government. See *Queen-Empress* v. *Fakirgavda* (1888).‖ But here there was no notice by Government or the local Government

*5 Mad. H.C.R., App. 38.
†*Ibid.*, App. 17; Weir, 3rd Ed., p. 311.
‡Weir, 3rd Ed., p. 310.
§*Ibid.*, p. 316.
‖Ratanlal's Unreported Criminal Cases, 1862—1898, p. 393.

KING-EMPEROR v. NGA U THIT.

officers. Moreover, it was not shown that the accused was aware of the notices. He said that he did not see them. If the notices had been good the accused could hardly be held to have had the necessary criminal intent, unless it was proved that he was aware of the prohibition.

The Municipal Secretary in his preliminary examination said that the accused, by driving his cart over the ground, caused damage to the ground, and I apprehend it is because carts do damage, that it is desired to keep them off.

The accused might have been charged, and presumably might have been convicted, under section 426, Indian Penal Code, of mischief. But he was not so charged, and there is of course no evidence on the record that damage was caused.

I therefore set aside the conviction and sentence, and direct that the fine be refunded.

Penal Code—363.

Criminal Revision No. 391 of 1909. August 21st.

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

KING-EMPEROR *v.* ASGAR ALI.

Kidnapping from lawful guardianship.

Where the female minor went to the accused's house and asked him to take her away, and she had no intention of leaving her parents if the accused did not consent,—

Held,—that the minor had no such intention of not returning as to remove her from her parents' guardianship, and consequently that the accused was rightly convicted.

References:

Crown v. *San Hlaing*, 1 L.B.R., 205.
Shwe Thwe v. *K.-E.*, U.B.R., 1907-09. I.P. Code, p. 1.
Te Hla v. *K.-E.*, ——— p. 11.
4 W.R., Crl., 6.
} Referred to.

THE accused Asgar Ali was convicted under section 363, Indian Penal Code, of kidnapping Lali, a female minor, from lawful guardianship and sentenced to one year's rigorous imprisonment. The conviction and sentence were upheld on appeal.

The parties were Muhammadans. The accused was a married man of 40, an intimate friend of the girl's father. The girl was apparently 14—at all events she was under 16—and lived with her parents at Ywataung.

On the afternoon of the day in question she disappeared from the house, while her mother was at the well, drawing water. She was found near midnight with the accused at Sagaing.

Her story was that she had fallen in love with the accused and went to his house and asked him to take her away, which he did.

Accused's defence was that the girl asked him to go with her to look for her father,—an absurd story on the face of it.

There was little or no evidence, besides the girl's, as to the circumstances under which she came to go away with the accused. But what there was, corroborated her.

The Magistrate and the Sessions Judge accepted her story. It may therefore be taken to represent the truth.

The question then was, whether accused committed the offence of kidnapping from lawful guardianship by consenting to go with the girl when she came to his house and asked him to take her away.

The Magistrate characteristically referred to no authorities. His judgment does not indicate that he had ever read any of the Rulings of this Court bearing on the case, or even that he had an intelligent comprehension of the points for determination.

The Sessions Judge went by the Lower Burma case of the *Crown* v. *San Hlaing*.* But the subject was dealt with more recently in *Shwe Thwe* v. *K.-E.*† and *Te Hla* v. *K.-E.*‡ In the former

*1 L.B.R., 205. †U.B.R., 1907-09, I.P. Code, p. 1. ‡*Ib.*, p. 11.

ING-EMPEROR v. ASGAR ALI.

case an attempt was made to ascertain the principles on which decisions of the various High Courts in such cases have proceeded. The conclusion arrived at was that the point to be determined is whether the female minor, when she left her guardian's house, had given up the intention of returning home. This was not expressly touched upon in *San Hlaing's* case, but in *Te Hla* v. *K.-E.* it was observed that apparently the learned judges in the former case took the view that the minor had not decided not to return when she left her parents' house, and was therefore still in their keeping when she met the accused.

In *Shwe Thwe's* case the girl was going on an errand when the accused met her. She had not contemplated leaving her parents when she left home. In *Te Hla's* case there had been a previous arrangement between the minor and the accused, that the minor was to leave her parents' house and meet the accused at a concerted spot and go away with him.

The present case, so far as the Magistrate succeeded in eliciting the facts, precisely resembled *San Hlaing's* case. The minor girl left her parents' house with the intention of asking the accused to take her away, and of going away with him if he consented. But there was nothing to show that she intended not to return if the accused refused to elope with her. There was nothing to show that she had any reason, apart from her infatuation for the accused, to wish to leave her parents.

This is a different situation from that in *Queen* v. *Gundur Singh** referred to in *Shwe Thwe's* case, where the girl had run away from her father's house in consequence of ill-treatment, and evidently intending not to return in any event.

My opinion is that, in the circumstances of the present case, the girl when she left her parents' house had no such intention of not returning as to remove her from their guardianship.

The conviction therefore was right.

The proceedings are returned.

*4 W.R., Cri., 6.

Penal Code—465, 477A.

Criminal Revision No. 578 of 1909. November 2nd.

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

KING-EMPEROR *v.* W. C. DAS.

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

Where a postal clerk was alleged to have retained money, the proceeds of a V.P.P. sale, for three months, and made a false entry in his register of V.P.Ps., to the effect that the parcel had been refused by the addressee and returned to the vendor, and then after he had been transferred to another station to have remitted the money to the vendor, *held*—(1) that if any offence was committed it was one under section 477A, which was triable only by the Court of Sessions; (2) that the 1st class Subdivisional Magistrate who tried and convicted under section 465 acted without jurisdiction; (3) that having regard to Stephen's definition of fraud, and the more recent decisions, the better opinion is that the falsification of a register to conceal a fraud previously committed would be fraudulent; (4) that in the present case, on the facts stated, the offence of criminal breach of trust would not be complete, and that the falsification would be designed to assist in the commission of the offence and be a part of the scheme; (5) that the character of the falsification must be judged by the accused's intention at the time he made it.

References:

I.L.R., 5 All., 221.
————533.
————8 All., 653.
————4 Bom., 657.
————22 Cal., 313.
————35 Cal., 450.
————11 Mad., 411.
2 N.W.P., 11.
6 N.W.P., 56.
Stephen's History of Criminal Law, Vol. II, page 121.
U.B.R., 1892—96, I, 279.
————1897—01, I, 328.
1 Weir, 4th Edn., page 554.

THIS case has been referred by the Sessions Judge. It was tried by the Subdivisional Magistrate. The facts found by the Magistrate were apparently these:—The accused, a postal clerk, received a sum of Rs. 62-4-0, the proceeds of a V.P.P. sale. He did not remit it immediately to the person to whom it should have been remitted, but kept it by him for some three months, and only then remitted it after he had been transferred to another station. Meanwhile he made a false entry in the Register of V.P.P. Articles Received to the effect that the parcel in question had been refused by the addressee and returned to the vendor. In respect to that entry he has been convicted under section 465, Indian Penal Code, and sentenced to three months' rigorous imprisonment. The first point to be noticed is that, if the accused committed an offence at all, it was one falling under section 477A and was triable only by the Court of Sessions. The Magistrate could not give himself jurisdiction by charging and convicting under section 465. This has been laid down repeatedly in

KING-EMPEROR v. W. C. DAS.

the published Rulings of this Court, *e.g.*, See *K.E.* v. *Nga Po Saw.**

The Sessions Judge noting the conflict of opinion between the High Courts of Calcutta and Madras on the one hand, and those of Allahabad and Bombay on the other, on the question whether falsification of records to conceal previous acts amounts to forgery, refers to the seeming approval with which *Q.E.* v. *Jiwanand*† was alluded to in *Lim Hoe* v. *Q.E.*‡, and concludes that accused was entitled to an acquittal in Upper Burma.

Here it is to be observed first that *Lim Hoe* v. *Q.E.* can hardly be taken to have affirmed the decision in *Jiwanand's* case. It only says, "apparently there would have been no forgery according to the Rulings." The point was not determined. The decision proceeded on another ground, *viz.*, that the document was not made dishonestly or fraudulently, because there was no wrongful gain or loss, the accused's object being merely to keep his own, and no possibility of any one being injured and therefore no fraud.

The next thing to be remarked is that section 477A was added to the Indian Penal Code by Act III of 1895 and that the Allahabad and Bombay decisions referred to are of earlier date. These are the cases of *Jageshar Parshad* (1873)§, *Lal Jumal* (1870)‖, *Jiwanand* (1882)†, *Mazhar Husain* (1883)¶, *Girdhali Lal* (1886)** and Shankar (1880)††.

The intent to defraud must, however, be made out practically whether section 465 or section 477A is applied, and on the interpretation of this expression I prefer to follow the more recent decisions in Madras, *Q.E.* v. *Sabapati* (1888)‡‡ affirmed in *Annasami Ayyangar* v. *K.E.* (1897)§§, and Calcutta, *Lolit Mohan Sarkar* v. *Q.E.* (1894)‖‖ and *K.E.* v. *Rash Bihari Das* (1908)¶¶.

The valuable definition or explanation of the expressions "fraud," "intent to defraud," "fraudulently," which has been repeatedly quoted from Stephen's History of the Criminal Law*** (see, for example, Ratan Lal's Law of Crimes, note to section 465), seems to me to support the wider interpretation adopted in the last-mentioned cases.

"Two elements are essential to the commission of the crime, namely, 1st deceit, or an intention to deceive, or in some cases mere secrecy, and 2ndly, either actual injury or possible injury, or an intent to expose some person either to actual injury, or possible injury by means of that deceit or secrecy. This intent.....is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage. The injurious deception is usually intended only as a means to an end.....a practical conclusive test of the fraudulent

*U.B.R., 1897-01, I, 328.
†I.L.R., 5 All., 221.
‡U.B.R., 1892-96, I, 279.
§6 N.W.P., 56.
‖2 N.W.P., 11.
¶I.L.R., 5 All., 533.
**I.L.R., 8 All., 653.
††——4 Bom., 657.
‡‡——11 Mad., 411.
§§1 Weir, 4th Edn., p. 554.
‖‖I.L.R., 22 Cal., 313.
¶¶——35 Cal., 450.
***Volume 2, page 121.

character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it, which could not have been had if the truth had been known? If so, it is hardly possible that that advantage should not have had an equivalent in loss or risk of loss to some one else; and if so, there was fraud."

It is impossible to say that the falsification of books to conceal an embezzlement does not come within this description.

But in the present case, assuming the facts to be as found by the Magistrate, and above set out, the accused is not shown to have converted the money to his own use or, in other words, to have committed the criminal breach of trust. He was merely withholding the money with the apparent intention of misappropriating it. The offence of criminal breach of trust was still incomplete.

In such circumstances the falsification of the books would not be done to conceal an offence previously committed but to assist in the completion of the offence: it would be part of the scheme.

And if the accused subsequently thought better of it and remitted the money, that would, not alter the character of the falsification, which must be judged by the accused's intention at the time he made it.

I have heard the learned Government Prosecutor, and the view which he has put before me of the law coincides with the foregoing. The accused was served with notice to show cause against a retrial under section 477A, but has not attempted to do so in any form.

As the Magistrate was without jurisdiction I set aside the conviction and sentence and direct a retrial on a charge under section 477A, Indian Penal Code, before the District Magistrate. The District Magistrate will be guided by the foregoing exposition of the law applicable to the case, and in the event of his convicting the accused he will no doubt allow for the period of imprisonment already undergone.

Whipping—3.

Criminal Revision No. 607 of 1907. July 26th.

Before G. W. Shaw, Esq.

KING-EMPEROR *v.* LA SAING.

Held,—"Previously convicted" means convicted before the commission of the second offence.

References :—

U.B.R., 1892-96, I, 146.
————1897-01, I, 247.
4 B.L.R., App. Jur., Criml., 5.
2 L.B.R., 14, dissented from.

The accused had been convicted on the 28th August 1906 and sentenced to two years' rigorous imprisonment including three months' solitary confinement. He was again on the 29th May 1907 convicted (under sections 379-75, Indian Penal Code) and sentenced to four years' rigorous imprisonment, including one month's solitary confinement, and a whipping of thirty stripes.

The Superintendent of the Jail drew attention to paragraph 448 of the Jail Manual. The District Magistrate, in forwarding the proceedings, reports that he sees nothing illegal in the sentence.

The learned District Magistrate has evidently overlooked *Queen Empress* v. *Nga Kaing** and the previous anonymous case† there cited. The Jail Manual of course in a matter of this kind merely gives effect to Judicial decisions, and it is by the latter that Magistrates and Courts are bound.

I set aside so much of the sentence passed by the District Magistrate, Myitkyina, in Criminal Regular No. 4 of 1907, as relates to solitary confinement.

The sentence was remarkable in another respect, and I wonder it did not attract the notice of the Appellate Court.

The sentence of whipping in addition to imprisonment purports to have been awarded under section 3 of the Whipping Act.

The previous convictions set out in the charge were (1) a conviction of robbery with hurt, section 394, Indian Penal Code, which is not in the same group as theft (section 379) and (2) a conviction of theft (section 379), dated the 28th August 1906, which was not a previous conviction at all in the sense of section 75, Indian Penal Code, since the offence with which the accused was charged in the present case was committed in June 1906.

The construction of section 3 of the Whipping Act, was the subject of a full Bench decision of the Lower Burma Chief Court in *King-Emperor* v. *Po Sein*,‡ and in the view taken there the sentence of whipping was improper but not illegal.

With great deference I venture to doubt the correctness of the conclusion at which the learned Judges arrived. It appears to me that the interpretation put upon the section by the Bombay and Calcutta High Courts, as far back as 1866 and 1870 and 1869 respectively, is the right one.

*U.B.R., 1897-01, I, 247. †U.B.R., 1892-96, I, 146.
‡2 L.B.R., 14.

KING-EMPEROR v. LA SAING.

As Justices Kemp and Glover in *Queen-Empress* v. *Udai Patnik** said :—

"The object of the law we take to be, that where a person notwithstanding a previous conviction of dacoity and consequent punishment, and after having a *locus pœnitentiæ* afforded him, again after completing a previous sentence commits the same offence he shall be liable to whipping in addition to any sentence of imprisonment awarded. He has, that is to say, been undeterred by imprisonment, and therefore may be punished on the second occasion with the stripes in addition."

There can be no reasonable doubt that this is what the legislature intended, and I do not think that the phraseology they actually used is so plain and free from ambiguity that it must be followed literally in a contrary sense.

"Previously convicted" is an expression commonly used in the sense of "convicted before the commission of the second offence," in the sense, that is, of section 75, Indian Penal Code.

This being so, I think it is permissible to consider the intention (see Maxwell on the Interpretation of Statutes, pages 26 *seqq*).

My interpretation could also be supported on other accepted principles.

The sentence of whipping is set aside as well as the sentence of solitary confinement.

*4 B.L.R , App : Jur. Cr. 5.

Workman's Breach of Contract—XIII of 1859—1.

Criminal Revision No. 177 of 1909. June 22nd.

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

KING-EMPEROR *v.* NGA TUN ZAN.

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

Held—that the Government in the Forest Department may prefer a complaint under section 1 as an employer carrying on business in the locality where the alleged breach of contract took place.

References:

3 L.B.R., 33, dissented from.
I.L.R., 11 All., 262.
U.B.R., 1902-03, I, Workman's Breach of Contract, 1.
———1904-06, I, Criminal Pro., 19.
———1902-03, I, W.B. of Contract, 3.
———1904-06, I, W.B. of Contract, 1.

Maxwell on the Interpretation of Statutes, 4th Edition, 67.

THE Deputy Conservator of Forests made a complaint to the Subdivisional Magistrate under section 1 of the Workman's Breach of Contract Act (XIII of 1859) against the Respondent, Tun Zan.

The Magistrate, on the strength of the Lower Burma Full Bench decision in *King-Emperor* v. *Ramiah*,* held that "Government Officers could not avail themselves of the Act," and "discharged" the Respondent.

The present application is presented by the Government Prosecutor on behalf of the Local Government. He contends that the Magistrate was wrong, that he was not bound by the Lower Burma decision, and that the view taken by the Chief Judge, and not that of the two Judges who disagreed with him, was correct.

As regards the Preamble the rule given by Maxwell on which the learned Chief Judge relied is, I think, conclusive.

The case of *Queen-Empress* v. *Indarjit*,† to which the Government Prosecutor has drawn my attention is a useful illustration. It was argued there on the basis of the preamble that fraud was an essential ingredient required to be proved in order to sustain a conviction under section 2, because it is said that the mischief aimed at is fraudulent breach of contract on the part of artificers, workmen and labourers. But Mr. Justice Straight held that the terms of the preamble could not be called in aid to restrict in operation or cut down the enacting sections, where the language of those sections was clear. He observed: "The purpose for which a preamble is framed to a Statute is to indicate what in general terms was the object of the Legislature in passing the Act, but it may well happen that these general terms will not indicate or cover all the mischief which in the enacting portions of the Act itself are found to be provided for." He referred to the striking instance mentioned by Maxwell in which, in the preamble, a Statute was spoken of as being directed against the abduction of heiresses and other girls with fortunes, yet the body of

*3 L.B.R., 33. † I.L.R., 11, All., 262.

KING-EMPEROR v. NGA TUN ZAN.

the Act was applicable to, and made penal, the abduction of all girls under 16 years of age (Maxwell on the Interpretation of Statutes, 4th Edition, page 67). Similarly, the learned Judge held that in the case before him as the section which invests a Magistrate with powers to deal with the person brought before him contains no mention of the word 'fraudulent,' it would be legislating and not interpreting the Act to read that word into the section, and that the element the Magistrate is to look for as going to constitute the offence under section 2 is "the wilful and without reasonable excuse, neglecting or refusing to perform the contract," etc.

Similarly it appears to me that the words of section 1, "any master or employer resident or carrying on business," are not to be restricted to the particular classes of persons, "manufacturers, tradesmen and others in the several Presidency Towns.....and in other places," who are mentioned in the preamble.

The reports of the English cases referred to in the Lower Burma judgment are not available, but, as far as I am in a position to judge from the references made to them, they do not in my opinion support the conclusions of the majority.

I do not think that Mr. Justice Fox was correct in his view that in ordinary language "to carry on business" is a phrase applicable only to private persons working for their own private gains, and not applicable to an Asylum Board who carry on business for the benefit of the charity, or to a Government department which carries on business for the benefit of the public revenues.

The expression in my opinion may be applied to such cases without doing violence to the common interpretation. I do not therefore consider that it is ambiguous. But if it were, it is impossible to find any help towards its construction in the preamble.

In view of what has been said above, the preamble cannot be construed as limiting the operation of the Act to (private) manufacturers, etc., carrying on business (for their private gain).

I venture to express my entire concurrence in the opinion of the learned Chief Judge.

The mischief aimed at is the breach of contract by workmen, artificers and labourers who have received money in advance for work they have contracted to perform and the insufficiency of the remedy open to the master or employer by way of civil suit.

And the Act is applicable to any artificer, workman or labourer who has received from any master or employer resident or carrying on business in the locality in which the Act is in force, an advance of money on account of work, etc., if he wilfully or without lawful or reasonable excuse neglects or refuses to perform the same, etc.

In the present case the Deputy Conservator of Forests was carrying on Forest business on behalf of Government in the locality in question, and the contract was entered into in connection with that business. I am of opinion that the case comes within the Act.

The decisions of the Lower Burma Chief Court are not binding upon the Courts in Upper Burma as those of this Court are.

It follows that the Magistrate was in error in holding that the Workman's Breach of Contract Act was inapplicable to a contract made with Government.

KING-EMPEROR v. NGA TUN ZAM.

It does not appear why the Magistrate passed an order of discharge. If this was a case of a prosecution for an offence at all, it was "a summons case" as defined in section 4 (1) (v), Criminal Procedure Code, and the proper order would have been one of acquittal. But the more correct view is that proceedings under the 1st clause of section 2 are not in the nature of a regular case at all, but of miscellaneous proceedings in which the appropriate order would be one dismissing the complaint (See *Phul Singh* v. *San Hla**).

If the order of discharge had been made in a regular warrant case, it would not have been necessary to set it aside before ordering further enquiry (See *Mi The Kin* v. *Nga E Tha*†). But as it was inappropriate I set it aside, and direct the Magistrate to make further enquiry into the complaint. His attention is drawn to *Asgar Ali* v. *Swamit* and *Nga Tun* v. *Fazl Kadir*.§

* U.B.R., 1902-03, I, W.B. of C. Act, p. 1.
† ———— 1904-06, I, Criminal Pro., p. 19.
‡ ———— 1902-03, I, W. B. of C. Act, p. 3.
§ ———— 1904-06, I, W.B. of C. Act, p. 1.

Circular Memorandum No. 1 of 1907.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

THE SESSIONS JUDGES, UPPER BURMA,

Dated Mandalay, the 27th February 1907.

SIR,

I am directed to invite a reference to paragraph 616 of the Jail Manual, and to inform you that it has been brought to the notice of the Local Government that prisoners convicted of dacoity have not, at least in some instances, been correctly classified.

On this the orders of the Local Government conveyed to the Inspector-General of Prisons are as follows :—

"Seeing that, in the absence of special orders, prisoners included in class (1) are never released, it is therefore very important that they should be correctly classified. I am accordingly to request that a reference may now be made, by the Superintendent of each Jail concerned to the Court which passed the sentence, in the case of every life-convict with regard to whom a classification has not been made or in whose case there is reason to suppose that the classificaton is incorrect.' The orders contained in the foot-note on page 147 of the Jail Manual should in effect be regarded as having retrospective effect."

I am to request that on a reference being received from a Jail under these instructions, you will make the classification referred to under paragraph 616 of the Jail Manual.

I have the honour to be,

SIR,

Your most obedient servant,

ED. MILLAR,

Registrar.

Circular Memorandum No. 5 of 1907.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

ALL SESSIONS JUDGES AND
DISTRICT MAGISTRATES, UPPER BURMA.

Dated Mandalay, the 24th May 1907.

The present address of Mr. C. R. Hardless, Government Expert in Handwriting, is 9, Wellington Square, Calcutta.

It is requested that this address be substituted for that given in paragraph 7 of the "Memorandum of Instructions, etc.," appended to this Court's Circular Memorandum No. 2 of 1905.

By order,
ED. MILLAR,
Registrar.

Circular Memorandum No. 7 of 1907.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

THE SESSIONS JUDGES AND
DISTRICT MAGISTRATES, UPPER BURMA.

Mandalay, the 4th November 1907.

The following instructions issued by the Government of India regarding the infliction of flogging as a judicial punishment by Criminal Courts are re-issued to all Sessions Judges and Magistrates in Upper Burma, for information and guidance :—

(1) All judicial floggings shall in future be inflicted in private, either at a jail or in an enclosure near the Court house;

(2) Wherever it is possible to do so, Magistrates shall secure the presence of a Medical Officer at the flogging;

(3) The practice shall invariably be adopted of spreading a thin cloth soaked in some antiseptic over the prisoner's buttocks during the operation;

(4) The cane employed shall never exceed the legal minimum of ½ inch in diameter in the case of persons over 16 years of age [section 392 (i) of the Criminal Procedure Code]; and in the case of juvenile offenders a still lighter cane shall be employed.

2. The Government of India having also intimated that they regard it as desirable that in the case of juvenile offenders the number of stripes inflicted shall not exceed fifteen, although the legal number is 30, Magistrates are instructed to limit the number of stripes in the case of juvenile offenders to a number not exceeding 15.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 2 of 1908 not republished as it is not of permanent interest.

Circular Memorandum No. 3 of 1908.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

THE SESSIONS JUDGES AND
DISTRICT MAGISTRATES, UPPER BURMA.

Dated Mandalay, the 6th February 1908.

In order to reduce the inconvenience resulting from the summoning of medical officers away from their stations to give evidence in criminal cases, the following instructions are issued for the guidance of Magistrates :—

Whenever a Magistrate is about to send a case, in which medical evidence is required, to another station for disposal, he should, before doing so, read the report of the medical officer, and in all cases in which it appears probable that the medical evidence will be of a purely formal nature, and that the personal attendance of the medical witness at the trial will not be essential, he should, if the medical witness is stationed at the place where he is sitting, examine him in the presence of the accused under section 509 of the Code of Criminal Procedure. A witness so examined should not be bound down to attend at the trial, unless his examination has shown that his personal attendance will be required, or the accused expresses a desire that he should be examined again at the trial. The accused should always be questioned on this point, and a note of his reply made at the foot of the deposition.

2. The deposition of the medical witness should be forwarded with the other papers to the Magistrate who is to hear the case. The latter on receipt of the case should examine the deposition with a view to deciding whether the personal attendance of the medical witness can be dispensed with, and should in each case pass a definite order as to whether he is to be summoned or not for attendance at the hearing of the case. An order for his attendance must of course be made if an application to this effect is made by, or on behalf of the accused.

3. The instructions contained in paragraphs 216—222 of the Upper Burma Courts Manual must be carefully followed in the examination of medical witnesses.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 5 of 1908.

To

THE SESSIONS JUDGES AND
DISTRICT MAGISTRATES, UPPER BURMA.

Mandalay, the 11th April 1908.

The attention of Magistrates is invited to section 383 of the Code of Criminal Procedure, which requires the Court sentencing an accused person to imprisonment, to send him forthwith, with the commitment warrant, to the jail in which he is to be confined. The transfer under escort of prisoners sentenced to confinement for periods not exceeding a few days involves unnecessary expense and inconvenience, and Magistrates, at stations where there are no jails, should for this reason avoid passing short sentences of imprisonment where there is a suitable alternative. When a short sentence is unavoidable, as is sometimes the case, particularly when imprisonment is imposed in default of the payment of a fine, the prisoner must be sent to jail without avoidable delay, except when it is impossible for him to reach the jail in time to undergo any part of his sentence therein, in which case he must of necessity be detained in police custody.

2. Cases have occasionally come to notice in which a person sentenced to imprisonment has been kept in Police custody for a considerable period to stand his trial in another case at the same place, or because his presence was required in connection with a police investigation in another case. Such procedure, besides involving a contravention of section 383 of the Code of Criminal Procedure, may have the very serious result of depriving the prisoner of facilities for appealing against his sentence in the first case until the period of limitation has expired. In the case of a prisoner who is required to stand his trial in a second case at the place where the jail in which he is confined is situated, the proper course would be to send a production order (Form U. B. $\frac{\text{Judicial}}{\text{Criminal 117}}$) to the officer in charge of the jail under section 37 of the Prisoners Act, 1900. This section, however, does not seem to contemplate the production of a prisoner for the purpose of a police investigation, and in the case of a Court at a place where there is no jail, the procedure above referred to may involve much inconvenience. When an accused person whose trial in one case has been heard is required to stand his trial in another case at a place where there is no jail, or is required anywhere for a police investigation, delivery of judgment in the first case should be postponed until the completion of the trial in the later case, unless such course is likely to involve prolonged delay in disposal of the first case.

Circular Memorandum No. 6 of 1908.

To

ALL SESSIONS JUDGES AND

MAGISTRATES IN UPPER BURMA.

Mandalay, the 20th May 1908.

The attention of all Sessions Judges and Magistrates is invited to the Judgment in the case of *Padan Byu* v. *Queen-Empress* (S.J.L.B., 423). It is of the greatest importance that accusations of improper inducement, pressure or other misconduct that are brought against the police in connection with the obtaining of confessions should invariably be thoroughly inquired into. The duty of Magistrates in this matter is explained in paragraph 179 of the Upper Burma Courts Manual. If an accused person makes any such allegations to the Magistrate trying or inquiring into his case, the Magistrate is not only bound to give him an opportunity of producing witnesses to prove his statements, but must himself call any witnesses whom he has reason to think able to give evidence in the matter, and must hold a searching inquiry.

If a Sessions Judge finds that these instructions have not been complied with by a Committing Magistrate, or if accusations of misconduct are made for the first time in his Court, he should himself hold such inquiry as is possible into their truth. He should also call upon the Magistrate for an explanation if necessary.

Both Sessions Judges and Magistrates should invariably record their opinion as to whether allegations of misconduct on the part of the police have been proved or disproved; and, if they consider that there are grounds for believing them true, should report the matter to the District Magistrate with a view to his taking any departmental action that may be necessary.

Circular Memorandum No. 9 of 1908.

To

ALL SESSIONS JUDGES AND
DISTRICT MAGISTRATES, UPPER BURMA.

Mandalay, the 24th June 1908.

The attention of Magistrates is drawn to Rule 87 (ii) of the Rules under the Burma Forest Act, 1902, reproduced below, and they are reminded that rewards cannot be paid under the Rule except upon the application of the Divisional Forest Officer.

Rule 87.—Rewards may be granted to any officers in the public service who are not gazetted officers and to informers as follows :—

* * * *

(ii) In the case of a conviction for a forest offence, the convicting Court may, on the application of the Divisional Forest Officer, award to any non-gazetted officer or informer, a sum which is not in excess of the amount recommended by such forest officer or of the proceeds of any fine, or confiscation, or both, ordered by such Court.

If no fine or confiscation has been ordered, or if the proceeds thereof are, in the opinion of the convicting Court, insufficient for the purpose, the convicting Court may, on the application of the Divisional Forest Officer, award to any non-gazetted officer or informer, a reward not exceeding the amount recommended by such forest officer, to be paid out of the funds at the disposal of such forest officer.

Circular Memorandum No. 11 of 1908.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

ALL SESSIONS JUDGES AND
DISTRICT MAGISTRATES, UPPER BURMA.

Mandalay, the 9th November 1908.

The Officiating Judicial Commissioner desires to draw attention to the remarks in paragraph 2 of the Local Government Resolution on the Criminal Justice Report for 1907, concerning the large number of persons in Upper Burma summoned as witnesses and not examined. As remarked in the Report, it seems probable that, if more care were devoted to the initial stage of prosecutions, many persons would be spared the trouble of attending the Courts as witnesses.

The Local Government has also suggested that fuller use should be made of the provisions of section 562 of the Code of Criminal Procedure. Magistrates of the third class and Magistrates of the second class not specially empowered should not desitate to follow the procedure indicated in the proviso to section 562 in suitable cases

In connection wth this subject reference should be made to the case *King-Emperor* v. *Natara Singh and others* (U. B.R., I., 1904-06, Penal Code, 7), which explains the scope of section 562.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 13 of 1908.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

ALL SESSIONS JUDGES AND
DISTRICT MAGISTRATES, UPPER BURMA.

Dated Mandalay, the 27th November 1908.

Special attention is invited to the provisions of section 28, Burma Village Act, 1907, which prohibits Magistrates from entertaining complaints against village headmen and rural policemen (*e.g., ywagaungs*) in respect of acts or omissions punishable under the Act, unless the prosecution is instituted by order of, or under authority from the Deputy Commissioner.

There was no similar section in the Upper Burma Village Regulation which was repealed by the Village Act.

It was ruled by the Lower Burma Chief Court in *Nga Shwe Yi* v. *The Crown** that the corresponding section of the Lower Burma Village Act (section 19) referred to a complaint of an act which constitutes an offence under the Indian Penal Code if such act is also punishable departmentally under the Village Act. For example, a headman who wrongfully confines a villager is liable to prosecution for this offence under the Indian Penal Code, section 342. But he is also liable to departmental punishment for the abuse of his powers of arrest under section 10 of the Burma Village Act, and therefore the complaint of the aggrieved person cannot be entertained without the Deputy Commissioner's prior sanction under section 28.

The Officiating Judicial Commissioner requests Sessions Judges and District Magistrates to see that the requirements of section 28 are brought to the notice of all Magistrates.

By order,

ED. MILLAR,

Registrar.

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* 1 L.B.R. 336 (Full Bench).

Circular Memorandum No. 14 of 1908.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

To

ALL SESSIONS JUDGES AND
DISTRICT MAGISTRATES, UPPER BURMA.

Dated Mandalay, the 21st December 1908.

With reference to paragraph 7 of Circular Memorandum No. 20 of 1905, it is intimated that the office of Mr. C. R. Hardless, Government Expert in Handwriting, has been removed to No. 1, Ripon Street, Calcutta, and all communications for that office should be addressed accordingly in future.

Telegrams for the Government Expert in Handwriting should be merely addressed "Handwriting".

This office Circular Memorandum No. 5 of 1907 is hereby cancelled.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 3 of 1909.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

To

ALL CIVIL AND CRIMINAL COURTS
IN UPPER BURMA.

Mandalay, the *March* 1909.

It having been brought to the notice of the Judicial Commissioner that a summons written in Burmese only, was forwarded for service in a place in the Madras Presidency, and that it was returned unserved owing to its contents not being understood, it is ordered that, in future, when a process is issued for service or execution to any Court outside Burma, it should be accompanied, if not written, in English, by a translation in English, or in the language of the Court of the locality in which it is to be served.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 5 of 1909.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

To

ALL SESSIONS JUDGES AND
DISTRICT MAGISTRATES, UPPER BURMA.

Mandalay, 4th June 1909.

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

Circular Memorandum No. 2 of 1905 of this Court is hereby cancelled.

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. *Despatch of Papers.*—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. *Distinguishing Marks.*—All papers should bear a distinguishing mark, such as A, B, C, or (1), (2), (3), *et cetera*. 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 1*a*. In the case of documents already entered as Court exhibits, the Court marks will, of course, be observed.

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

4. *Encircling of signatures or portions of writings intended for examination.*—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 clearly indicated by being encircled in pencil (black lead, or red or blue chalk). Ink marks should be avoided.

5. The encircling or marking off of signatures or portions of writings for examination or comparison should be carefully and neatly done by means of a fine pointed pencil. The encircling should be complete and mere underlines and brackets avoided. If there are other writings in juxtaposition, the dividing line should clearly exclude the outside portions. Carelessness in this matter causes unnecessary increase of work and is apt to lead to mistakes. Special attention should be given in this matter in regard to interpolations, additions and overwritings, and to signatures on bonds and on the reverse of G. C. Notes where there are other signatures, endorsements and writings.

25 Cr.

6. *Standards or writings for comparison.*—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.

7. When selecting handwritings for comparison, writings written about the same period as the document in question should, as far as

possible, be selected . This should be done in cases where already existing writings of the suspect or accused are readily available, whether contained among correspondence or in books or registers.

8. When taking specimen handwritings of several suspected or accused persons, the writing of each individual should be taken on. specimen handwritings the matter shauld preferably be dictated. In is required to give several specimens of his signature, it is also advisable to take each specimen on a separate paper, care being taken to remove the previously written slips from sight of the individual when he is writing the other specimens. For the purposes of obtaining specimen handwritings the matter should preferably be dictated. In England and America the suspect, if unable to readily write from dictation, is made to write from type-written or printed matter, and not manuscript; so the chances of imitation or variation of formation is minimised. In no case should the suspect be allowed to see the document in question to write from. When any lengthy piece of writing is dictated or given for copy, the actual time occupied in writing should be noted and also the kind of pen used and the position of the paper, while in the act of writing, *i.e.*, whether laid on a flat hard surface, or held across the palm or placed across the thigh or in any other position. The officer taking the specimen should state on it the name of the writer, together with the particulars above referred to, and affix the date of the writing. He should also certify, on the same sheet, that the specimen was written in his presence.

9. *Dating of writings.*—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.

10. *Pen and writing pad.*—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.

11. *Sealing wax impressions.*—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.

12. *Care of documents of which the age or date of the writing is required.*—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.

13. *Covering letter, forwarding writings or exhibits.*—In all cases where papers for examination are despatched to the Expert, they should be sent, carefully packed, by registered letter or parcel

post, to his official address in 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 as to the circumstances of the writing and on any other 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.

14. *All writings to be sent or given for previous examination.*—Whenever possible writings should be sent to the Expert and an opinion obtained before they are put in as 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. It may, however, be noted that the best conveniences and facilities for examining writings are available in the Expert's office in Calcutta, and that several Courts do forward exhibits to the Expert for examination by him in Calcutta.

15. *Requisitions and summonses for Court attendances.*—In view of the constant calls made on the Expert, requisitions for Court attendances should be made by telegram and the acceptance of dates promptly notified by telegram.

16. All summonses for Court attendances should, in order to avoid delay, be issued on the Government Expert in Handwriting direct and not through the Calcutta Courts, or the Director of Criminal Intelligence.

17. 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*) the extent of the writing on which opinion is sought, whether a signature, letter or a number of papers ;

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

18. When summonses or requisitions for Court attendances are issued in regard to writings on which opinion has already been obtained, an entry should be inserted on the summons or mention made in the letter or requisition of the fact and a reference given to the No. and date of the letter or report containing the opinion.

19. 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. It sometimes happens that owing to an emergent call or an important case or other circumstances the Expert is obliged to revise his current programme of Court attendances. In such cases he will suggest fresh dates for the acceptance of the Courts for which revised dates of attendance become necessary.

20. *Issue of Commissions.*—In cases where it is decided to issue a commission to Calcutta for the examination of the Government Expert in Handwriting, it should first be ascertained from the latter what dates would be convenient. The Expert will then intimate a date when he will be at his headquarters and also mention whether it would be convenient to issue the commission on the Chief Presidency Magistrate, Calcutta, or the Police Magistrate, Sealdah, for recording his evidence.

21. *Deputing of officers to confer with Expert.*—When it is desired in any special case to depute an officer to confer with the Government Expert in Handwriting at Calcutta, enquiry should be made beforehand as to the dates when the Expert will be in Calcutta and the deputed officer can conveniently see him.

22. *Conference with Expert prior to his examination or evidence.* Whenever possible the Government Pleader or Court Inspector in charge of the case should arrange for a preliminary personal conference with the Expert prior to the latter's examination or giving evidence.

23. *Officers to intimate results of references.*—All officers making references to the Expert should intimate to him, in due course, the final result of such reference, especially the finding in regard to the handwriting involved.

24. *Expert not to be detained.*—As the Government Expert in Handwriting is required to keep up to his programme of Court attendances, and attend to work even while travelling, Courts and Prosecuting Officers should arrange to take his evidence promptly and not detain him longer than is absolutely necessary. Similarly, when on investigation, the Expert should not be delayed longer than is actually requisite.

25. *Official address.*—The official address of the Government Expert in Handwriting is C. Hardless, Esq., No. 1, Ripon Street, Calcutta.

26. *Telegraphic Code aadress.*—Telegrams for Government Expert in Handwriting should be addressed *Handwriting, Calcutta.*

27. *All communications to be addressed to Calcutta.*—All covers and replies to letters and telegrams from the Expert, including those issued by him while travelling, should unless in any particular case otherwise specially requested, be addressed to Calcutta.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 6 of 1909.

To

THE SESSIONS JUDGES AND
DISTRICT MAGISTRATES, UPPER BURMA.

Mandalay, the 8th June 1909.

The attention of Magistrates is invited to the provisions of the new Whipping Act No. IV of 1909, by which the whole of the Whipping Act, 1864, including the second schedule to the Burma Laws Act, being the special section 6 substituted for Upper Burma by the Burma Laws Act, 1898 (*see* Burma Code, Edition 1899, page 275), has been repealed, and the following changes in the law introduced with effect from the 22nd March last [General Clauses Act, 1897, section 5 (1)].

2. Whipping can no longer be awarded in lieu of, or in addition to, other punishment in the cases specified in the second schedule to the Burma Laws Act.

3. Whipping can no longer be awarded *in lieu* of other punishment in cases of—

Theft by a clerk or servant, section 381, Indian Penal Code.
Extortion by threat, section 388.
Putting a person in fear of accusation in order to commit extortion, as defined in section 389.
Dishonestly receiving stolen property, section 411.
Dishonestly receiving property stolen in dacoity, section 412.

4. Whipping can no longer be awarded on the ground of a previous conviction either in lieu of, or in addition to, other punishment in certain cases as could be done under the old Act.

5. Whipping can be awarded in lieu of, or in addition to, other punishment in cases of—

Rape, section 376.
Certain cases of unnatural offence, section 377.
Voluntarily causing hurt in committing or attempting to commit robbery.
Dacoity.

6. Juvenile offenders may be punished with whipping as before, except that some new restrictions have been introduced. Thus, of offences punishable under the Indian Penal Code, offences specified in Chapter VI and offences punishable under 153A and 505 are excepted, as well as offences punishable with death, only those offences punishable with imprisonment under any other law are now punishable with whipping which have been specially notified by the Governor-General in Council, and the maximum number of stripes which can be awarded in the case of a juvenile is 15.

7. The Criminal Justice Regulation remains in force. Therefore Upper Burma is not affected by the new provision restricting the power of awarding the punishment of whipping to first class Magistrates.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 7 of 1909.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

ALL SESSIONS JUDGES AND
DISTRICT MAGISTRATES, UPPER BURMA.

Dated Mandalay, the 10th July 1909.

It having been brought to notice that there is a growing tendency among Subordinate Magistrates to sentence juvenile offenders to imprisonment, the Judicial Commissioner invites attention to the instructions contained in paragraphs 110 and 133 of the Upper Burma Courts Manual, and to the following:—

Juvenile offenders should not be sentenced to imprisonment unless from the nature of the case it is impossible either to—

(*a*) send them to a reformatory,

(*b*) whip them,

(*c*) discharge them under section 31 of the Reformatory Schools Act, or to

(*d*) bind them over under section 562 of the Code of Criminal Procedure.

The Judicial Commissioner also desires to enjoin caution against the infliction of fines on juveniles when the fines cannot be paid, as in default of payment of fine it will be necessary to commit the juvenile to prison, and contact with jail life, which admission to a jail involves, carries with it the risk of contamination.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 8 of 1909.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

ALL SESSIONS JUDGES AND
DISTRICT MAGISTRATES, UPPER BURMA.

Dated Mandalay, the 19th July 1909.

In continuance of Circular Memorandum No. 3 of 1908, attention is drawn to the inconvenience involved in the practice of recalling for examination Medical witnesses who have been transferred to another District or have gone on leave out of the Province.

Care should be taken, as far as possible, to avoid this by recording the evidence under section 509, Criminal Procedure Code, before the witness leaves the District, or where it has not been possible to do this, by issuing a commission under section 503 or section 506, Criminal Procedure Code.

The Criminal Procedure Code gives a Magistrate discretion to summon or not to summon a witness. See sections 208, 216, 244, 252, 257, 503, 506.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 10 of 1909.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

ALL SESSIONS JUDGES AND
DISTRICT MAGISTRATES, UPPER BURMA.

Mandalay, the 9th November 1909.

Prisoners sentenced to imprisonment for a term of not more than five years, who at the time of their sentence are not less than 15 and not more than 18 years of age, will be confined in the Meiktila Jail, which has been set apart for juvenile prisoners.

In order to prevent prisoners who are in reality over 18 years of age but represent themselves as under, being sent to the Meiktila Jail, where the treatment of prisoners is less penal than in ordinary jails, all Courts should make careful enquiry into the age of prisoners who represent themselves as under 18 years of age, in the same manner as is now done in the case of boys who are to be sent to a Reformatory, and if after such enquiry their age is found to be under 18, the fact should be noted on the warrant of commitment to jail.

By order,
ED. MILLAR,
Registrar.

G.B.C.P.O.—No. 20, J.C., U.B., 10 (*b*), 17-1-1918—250.