

CRIMINAL REVISION.

Before U Aung Tha Gyaw, J.

H.C.
1948

Mar 8.

THE UNION OF BURMA (APPLICANT)

v.

AYE MAUNG (RESPONDENT).*

Penal Code, s. 64—Imprisonment in default of fine—S. 35, Criminal Procedure Code—Power of Court to direct sentences to run concurrently.

The accused was found guilty of three separate offences under s. 409, Penal Code. He was sentenced in respect of each offence to undergo one and a half years' rigorous imprisonment and to pay a fine of Rs. 150 or six months' imprisonment in default. The Magistrate directed the sentences of imprisonment including one in lieu of fine to run concurrently.

Held: That this is clearly opposed to s. 64, Penal Code. The additional sentence must be in excess of any other imprisonment. Under s. 35, Criminal Procedure Code, the criminal Court is not competent to direct that such sentences should run concurrently.

Kanda Moopan (a) Gopal Naicker, I.L.R. (1937) Mad. 362; *King-Emperor v. Subrao Sesharao*, A.I.R. (1926) Bom. 62, followed.

Ebrahim v. King-Emperor, Cr.L.J., Vol. XXXII (1931) 637; *The Crown v. Chanan Singh*, I.L.R., Vol. XXI, Lah (1940) 143, referred to.

U AUNG THA GYAW, J.—This is a reference made by the District Magistrate, Rangoon, in his Criminal Miscellaneous No. 2 of 1948, calling attention to the three sentences of imprisonment and fine passed against the respondent by the 5th Additional Magistrate, Rangoon, in his Criminal Regular Trial No. 334 of 1947. The respondent was found guilty in respect of three separate offences under section 409, Penal Code, and was sentenced in respect of each offence to undergo one and a half years' rigorous imprisonment and to pay a fine of Rs. 150 with the option of undergoing six months' rigorous imprisonment in default.

* Criminal Revision No. 10-B of 1948 being review of the order of the 5th Additional Magistrate, Rangoon, dated the 15th December 1947, passed in Criminal Regular Trial No. 334 of 1947.

The Magistrate further directed that the substantive sentences of imprisonment were to run concurrently as also the sentences of imprisonment passed in default of payment of fine.

There is no doubt that the latter part of the learned Magistrate's sentences directing the terms of imprisonment imposed in default of payment of fine to run concurrently is clearly opposed to the spirit of the terms of section 64 of the Penal Code. Section 64 of the Penal Code reads :

"In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence."

This provision of law declares that the Court is competent to impose a sentence of imprisonment in default of payment of fine and that such terms of imprisonment shall be in excess of any other imprisonment to which the accused may have been sentenced. Under section 35, Criminal Procedure Code, a criminal Court is not competent to direct that sentences of imprisonment imposed for default in payment of fine should run concurrently. [See *Kanda Moopan* (alias) *Gopal Naicker* (1), and *King-Emperor v. Subrao Sesharao* (2).] In the latter case the accused was convicted under section 380, Indian Penal Code, in respect of two acts of theft, and he was sentenced to suffer rigorous imprisonment for one day and to pay a

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(1) I.L.R. (1937) Mad. 362.

(2) A.I.R. (1926) Bom. 62.

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fine of Rs. 50, or in default to suffer rigorous imprisonment for three months, for each of the two offences. The Magistrate further directed that the two sentences should run concurrently.

This case appears to be on all fours with the one now in question and must be regarded as good authority for the view now put forward that the sentences passed against the respondent are illegal. Similar views were held in the cases of *Ebrahim v. King-Emperor* (1) and *The Crown v. Chanan Singh* (2). I accordingly set aside the sentences upon the respondent so far as they relate to concurrent sentences of imprisonment in default of payment of fines imposed upon him and direct that the said sentences of imprisonment passed by the learned Magistrate in default of payment of fines shall run consecutively.

(1) Cr. L.J., Vol. XXXII (1931) 637. (2) I.L.R., Vol. XXI, Lah. (1940) 413.