APPELLATE CRIMINAL.

Before U Thaung Sein, J.

H.C. 1948

SAN KYI AND ONE (APPELLANTS)

v.

June 3.

THE UNION OF BURMA (RESPONDENT).*

Code of Criminal Procedure, ss. 366, 367 and 537—Judgment written after sentence passed—Whether such defect cured by s. 537.

Held : That though ss. 366 and 367 require that judgments in every criminal trial of original jurisdiction should be pronounced in open Court and signed and dated at the time of pronouncing it yet the omission to write a judgment before sentence is pronounced does not vitiate the conviction and is an irregularity covered by s. 537 and is curable unless it has occasioned a failure of justice.

Queen-Empress v. *Hargobind Singh and others*, 14 All. 242, not followed.

Tilak Chandra Sarkar and others v. *Baisagomoff*, 23 Cal. 502 ; *Ata Muhammad* v. *Emperor*, 25 Cr.L.J. 705, followed.

Judges and Magistrates should comply with the express provision of ss. 366 and 367 of the Code. Failure to obey such provisions is deprecated.

Mya Thein (Government Advocate) for the respondent.

U THAUNG SEIN, J.—The two appellants, Maung San Kyi and Maung Kyan, were convicted of offences under section 392, Penal Code, and sentenced to five years' rigorous imprisonment each by the learned Special Judge, Kyaukse (U Tha Kyaw), on the 7th February 1948. On that date the learned Special Judge had not written his judgment though he noted in the diary of the proceedings as follows :

"7-2-48. Called. * * * *
The judgment passed. It is directed that they do suffer 5 years' R.I. each. When the sentence is pronounced the accused

* Criminal Appeal No. 225 of 1948 being appeal from the order of the Special Judge of Kyaukse in Criminal Regular Trial No. 10 of 1947, dated the 7th February 1948.

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San Kyi requested the Court to add 2 more years to his sentence. I propose to take time to write the judgment.
Put up on 9-2-48."

It was only on 9th February 1948 that the judgment was written and signed, but it bore the date 7th February 1948. The learned Special Judge had made the following audacious note in the diary of 9th February 1948 to exonerate himself for the delay in writing the judgment:

"Later, it is to be observed that the omission to write the judgment at the time of pronouncing the sentence is curable under s. 537, C.P.C."

At the outset, I should like to point out that a Special Judge who resorts to the evil practice of writing judgments after pronouncing sentences on accused persons is certain to arouse grave suspicions against his character and integrity and before long is likely to find himself in very serious trouble.

Now, the first question that arises in the present appeal is whether the failure to write a judgment at the time of pronouncing sentence on the appellants is an illegality which vitiates the conviction and sentence, or merely an irregularity curable under section 537, Criminal Procedure Code. It is clearly laid down in sections 366 and 367, Criminal Procedure Code, that "the judgment in every trial in any criminal Court of original jurisdiction" should be pronounced in open Court and signed and dated by the presiding officer at the time of pronouncing it. I need hardly stress that it is extremely desirable that Special Judges and Magistrates should obey the express provisions of these two sections in the Criminal Procedure Code, *viz.* that they must write their judgments before pronouncing sentences on accused persons. Any Special Judge or

Magistrate who fails to comply with these provisions may render himself liable to disciplinary action being taken against him.

As regards the effect of the omission to write a judgment before pronouncing sentence, it appears that there are conflicting decisions of some of the Indian High Courts on this point. In *Queen-Empress* v. *Hargobind Singh and others* (1) the Allahabad High Court ruled :

"Inasmuch as the sentence in the case of a conviction, and the direction to set the accused at liberty in the case of an acquittal, can only follow on the decision and cannot precede it and inasmuch as the decision must be contained in the written judgment which is read out in open Court, and in such judgment only, it must necessarily follow that, where there is no written judgment when the sentence is passed, the sentence is illegal."

However, a contrary view was laid down by the Calcutta High Court in *Tilak Chandra Sarkar and others* v. *Baisagomoff* (2) as per the following head-note :

"In this case, after the evidence was adduced on both sides, the Assistant Magistrate fixed a day for hearing argument and passing judgment. On that day argument was heard, and the case adjourned to another day for judgment, when the Magistrate pronounced sentence, though he had not written his judgment. The judgment was, however, written on the evening of the same day.

Held, the judgment of the Assistant Magistrate was not in accordance with the provisions of sections 366 and 367 of the Criminal Procedure Code. In the circumstances of the case the omission of the Magistrate in recording a judgment before pronouncing his sentence was an omission or irregularity which fell within the purview of section 537 of the Code. The sentence itself by reason of this irregularity was not an illegal sentence so as to render the trial nugatory."

(1) 14 All. 242. (2) 23 Cal. 502.

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It is interesting to note that the case of *Queen-Empress* v. *Hargobind Singh and others* (1) was discussed in the latter case, and it was pointed out that the learned Judges who dealt with the former case do not appear to have considered the provisions of section 537, Criminal Procedure Code.

The same view as that of the Calcutta High Court was expressed by the Lahore High Court in *Ata Muhammad* v. *Emperor* (2) in the following terms :

"The omission of a Magistrate to write a judgment before sentence is pronounced is an omission or irregularity which is covered by section 537 of the Criminal Procedure Code and is curable except where it has occasioned a failure of justice."

As far as I am aware, there is no ruling by the Rangoon High Court directly on the matter under consideration.

With all due respect, I am in agreement with the views of the Calcutta and Lahore High Courts that the omission to write a judgment before pronouncing a sentence is merely an irregularity curable under section 537, Criminal Procedure Code, except where there has been a failure of justice or where the accused has been prejudiced. Applying these principles to the present case, I fail to see how there has been a failure of justice or how the appellants have been prejudiced in any way. The appellants confessed before a competent Magistrate of having taken part in the dacoity for which they were convicted, and they made no attempt to resile from those confessions. Apart from these confessions, the two appellants were also seen and recognized by the passengers of the bullock carts which were attacked. The two appellants could have been convicted on their confessions alone, and apparently they anticipated a severer sentence than

(1) 14 All. 242. (2) 25 Cr.L.J. 705.

five years' rigorous imprisonment. According to the diary entry of 7th February 1948 the appellant San Kyi requested the learned Special Judge to enhance the sentence passed on him by two years.

Under the circumstances, I have no doubt that the two appellants were rightly convicted of offences under section 392, Penal Code, and deserved the sentences meted out to them. The appeal is dismissed.