CRIMINAL REVISION.

Before Panckridge and Patterson JJ.

1933

Jan. 3, 16.

JOGENDRACHANDRA RAY

v.

THE SUPERINTENDENT OF THE DUM DUM SPECIAL JAIL.*

Ordinance—Nature and scope of an ordinance—Penalties, if can endure after the expiry of the ordinance authorising it—"Anything done", if includes penalties—Penal statute, how to be construed—Special Powers Ordinance (X of 1932), s. 80—Interpretation Act (52 & 53 Vict. c. 83), s. 38—General Clauses Act (X of 1897), ss. 6, 30.

The Governor-General is competent to authorise the courts by means of an Ordinance to pass sentences of imprisonment for terms beyond the date of expiry of such Ordinance.

Although section 38, clause (2) of the Interpretation Act of 1889 and sections 6 and 30 of the General Clauses Act of 1897 do not apply in terms to temporary statutes, they merely give statutory expression to a rule of construction which was already in existence and which applied with equal force to statutes that had been expressly repealed and to temporary statutes which had expired by effluxion of time.

Steavenson v. *Oliver* (1) referred to.

An Ordinance stands on precisely the same footing as if it were a temporary Act passed by the Indian legislature.

By virtue of section 80 of Ordinance X of 1932, the detention in custody of a person undergoing a sentence of imprisonment for an offence punishable under Ordinance II of 1932, after the expiry of the latter Ordinance, is legal.

The words "anything done" in section 80 of Ordinance X of 1932 cover penalties.

It is true that a penal statute should be strictly construed, but it is none the less true that every statute, whether penal or not, should be construed in a manner consistent with common sense, and if the intention of the legislature is not apparent from the words of the statute itself, it ought to be presumed to have been such as is consistent with reason and justice.

CRIMINAL REVISION.

The material facts appear from the judgment of the Court.

*Criminal Miscellaneous Case, No. 160 of 1932, against the order of M. C. Ghosh, Sadar Subdivisional Magistrate of Barisal, dated March 12, 1932.

(1) (1841) 8 M. & W. 234; 151 E. R. 1024.

The Officiating Advocate-General, A. K. Roy (with him *Anilchandra Ray Chaudhuri*) for the Crown. Ordinance II of 1932 expired on the 3rd July, 1932, but before its expiry, Ordinance X of 1932 was passed. By virtue of section 80 of Ordinance X, "anything done" under Ordinance II would be deemed to have been done under Ordinance X. The latter Ordinance was in force on the 5th December, 1932, when this application was moved, so the detention of the petitioner was legal on that date. With regard to the question whether the penalty provided by section 21 of Ordinance II was *ultra vires*, an Ordinance stood on the same footing as an Act of the Indian legislature. There was nothing in either section 72 or any other section of the Government of India Act limiting the powers of the Governor-General to provide for the imposition of any penalty that he thought fit. As the Privy Council pointed out the power given by section 72 was an absolute power without any limit. *Bhagat Singh* v. *King Emperor* (1). An Ordinance should be looked upon as a temporary Act. A proceeding pending at the time of its expiry may come to an end, but a trial that is complete and punishment that has been inflicted are not affected. The detention, therefore, is lawful. Craies' Interpretation of Statutes, 3rd edition, page 342. If the Governor-General was authorised to pass the Ordinance which was good law and existing at the time the punishment was inflicted, the detention was legal. Although section 38 of the Interpretation Act of 1889 or sections 6 and 30 of the General Clauses Act do not apply in terms, the principle underlying them applies. This was considered incidentally in the recent case of *Jogendramohan Guha* v. *Emperor* (2). The power given to the Governor-General to promulgate the Ordinance was absolute and it could not be said that it was exceeded. The sentence

(1) (1931) I. L. R. 12 Lah. 280 ; L. R. 58 I. A. 169.

(2) (1932) I. L. R. 60 Calc. 545.

1933

Jogendrachandra Ray v. The Superintendent of the Dum Dum Special Jail.

authorised by the Ordinance was legal and the detention was also lawful.

Narendrakumar Basu (with him *Ramendrachandra Ray*) for the petitioner. The words "anything done" in section 80 of Ordinance X of 1932 could not cover "any penalty inflicted." When, at the expiry of a temporary Act, the punishment inflicted thereunder was to be continued, it had to be definitely provided for in the statute itself. This was done in the Defence of India Act of 1915 and the Emergency Powers Act of 1920. It was not a question of interpretation at all. It was a question of taking away the liberty of the subject which could not be done either by implication or by inferential legislation, but should be expressed with reasonable clearness. It might have been intended by the Governor-General to continue the punishment under Ordinance II by section 80 of Ordinance X, but he has not succeeded in doing so. Section 72 of the Government of India Act gave power to the Governor-General to make Ordinances for a temporary period. Certainly the Parliament did not intend to hand over power to the executive to go on promulgating Ordinance after Ordinance. If there was an emergency, it existed only for 6 months, at the end of which the Government must ask the legislature to meet the situation by passing an Act, just as in the case of martial law. If it were desired to continue the effect of an expiring Ordinance, a validating Act should have been passed. The detention of the prisoner was clearly illegal and he should be set at liberty.

Cur. adv. vult.

PATTERSON J. The petitioner was convicted under section 21 of Ordinance II of 1932 on the 12th of March, 1932, for having disobeyed, or neglected to comply with, an order that had been made by the District Magistrate of Bakarganj under section 4 of that Ordinance and that had been duly served on the petitioner on the 4th of March, 1932. He was

sentenced to undergo rigorous imprisonment for eighteen months and to pay a fine of Rs. 150 and in default to undergo a further term of imprisonment for three months. He is now serving out his sentence in the Dum Dum Special Jail. By this Rule, the Superintendent of the Jail has been called on to show cause why the petitioner should not be set at liberty on the ground that the provisions of section 21 of Ordinance II of 1932, authorising the court to pass sentences of imprisonment which would continue beyond the date of expiry of the said Ordinance, are *ultra vires* of section 72 of the Government of India Act of 1919, and also on the ground that the sentence of rigorous imprisonment for eighteen months passed on him ceased to have effect after the said date.

It appears that Ordinance II of 1932 came into force on the 4th of January, 1932, and that it remained in force up to and including the 3rd of July, 1932, on which date it expired under the provisions of section 72 of the Government of India Act, which limit the duration of an Ordinance under that section to a period of six months. It further appears that before the expiry of Ordinance II of 1932 another Ordinance (X of 1932) was made by the Governor-General in Council under section 72 of the Government of India Act, and that it came into force on the 30th of June, 1932. This Ordinance, among other things, re-enacted the provisions of section 4 of Ordinance II of 1932, and also the provisions of section 21 of that Ordinance, while section 80 contained a saving clause to the effect that anything done in pursuance of any provision of Ordinance II should be deemed to have been done in pursuance of the corresponding provision of Ordinance X.

Now, section 72 of the Government of India Act lays down that an Ordinance made under that section shall, for the space of six months from the date of its promulgation, have the like force of law as an Act passed by the Indian legislature, and that the power of making such Ordinances is subject to the like restrictions as the power of the Indian legislature

1933

Jogendrachandra Ray v. The Superintendent of the Dum Dum Special Jail.

Patterson J.

to make laws. That being so, the two Ordinances, with which we are now concerned, may, for the purposes of the present case, be regarded as standing on precisely the same footing as if they had been temporary Acts passed by the Indian legislature. Sections 4 and 21 of Ordinance II are perfectly clear and unambiguous, as are also the corresponding provisions of Ordinance X, and this being so, it must, I think, be held that section 80 of Ordinance X provides a complete answer to the petitioner's contention that, at any rate since the 3rd July, 1932, (the date on which Ordinance II expired), he has been illegally detained in custody. It has been urged on his behalf that if, apart from the provisions of Ordinance X, he would have been entitled to be released from custody on the expiry of Ordinance II, the terms of section 80 of the former Ordinance are not sufficiently clear and precise to justify his further detention. It is contended that if the intention of the legislature (the legislature in the present instance being the Governor-General) was that sentences imposed under the expiring Ordinance should continue to have effect even after the date of its expiry, it should have expressed its intention with greater clearness and should not have left it to be gathered by inference, —that the words of section 80 do not make it at all clear that such was the intention, —and in particular that the words "anything done," as used in that section, do not include *penalties*. I do not agree with these contentions:—I cannot imagine any more comprehensive expression than "anything "done in pursuance of any provision" of such and such Ordinances, and it seems to me to be perfectly clear that this expression covers, and was intended to cover, the case of penalties inflicted under Ordinance II and the other expiring Ordinances referred to in Ordinance X.

The conclusion stated above is of itself sufficient for the disposal of this Rule, but, as the question of the competence of the Governor-General to authorize the courts by means of an Ordinance to pass sentences

of imprisonment for terms extending beyond the date of expiry of such Ordinance has been raised by this Rule and has been fully discussed before us, I think it is desirable that this question should be decided. If the Ordinance had been expressly repealed, the question would probably have presented very little difficulty in view of the provisions of section 38, clause (*2*) of the Interpretation Act of 1889, and of sections 6 and 30 of the General Clauses Act of 1897, but although these provisions do not apply in terms to the case of a temporary statute the term of which has expired, it may very reasonably be contended that they merely give statutory expression to a rule of construction which was already in existence and which applied with equal force to statutes that had been expressly repealed and to temporary statutes the term of which had expired. This rule of construction was recognized in England as far back as the year 1841 in *Steavenson* v. *Oliver* (1) in which a question similar to the one now under consideration arose with reference to the effect of the expiry of an Act on rights acquired while the Act was in force. The learned Judges who dealt with that case were of opinion that not only rights acquired under a temporary Act, but also penalties imposed thereunder, would survive its expiration. The principle underlying their decision appears to have been that transactions that have been completed, rights that have been acquired and penalties that have been incurred while a statute is in force, are not (in the absence of an express provision to the contrary) affected by the mere fact of the statute having ceased to be in force, —a principle which has since received statutory recognition in the Interpretation Act of 1889 in the case of express repeal, though not as yet in the case of expiration by effluxion of time. This rule seems to me to be founded not only on considerations of convenience, but also of reason and justice, and it ought in my opinion to be kept prominently in mind

(1) (1841) 8 M. & W. 234 ; 151 E. R. 1024.

1933

Jogendrachandra Ray
v.
The Superintendent of the Dum Dum Special Jail.

Patterson J.

in endeavouring to decide the question now under consideration.

The question is really one of construction, and relates mainly to the construction of section 72 of the Government of India Act. Section 21 of Ordinance II of 1932 authorizes the imposition of sentences of imprisonment that may extend to two years, and it is clearly within the competence of the Indian legislature to create offences by statute and to make them punishable in this manner. It was, therefore, *prima facie* within the competence of the Governor-General to make and promulgate an Ordinance containing provisions of this character. The question is whether it was the intention of Parliament in limiting the duration of an Ordinance to six months, to limit also the sentences of imprisonment that might be imposed under any such Ordinance to sentences that would expire with the expiry of the Ordinance. There is nothing in the wording of section 72 to justify such a conclusion, and, in my opinion, Parliament cannot possibly have intended anything so unreasonable. To hold otherwise would be to hold that Parliament intended not only to prevent the Governor-General from authorizing the courts to impose such sentences of imprisonment as might be necessary for the purpose of dealing effectively with the emergency the existence of which the promulgation of an Ordinance pre-supposes, but also that the maximum sentences of imprisonment that the courts might be authorized to impose should vary from six months' rigorous imprisonment in the case of convictions on the date on which the Ordinance came into force to imprisonment till the rising of the court, or something equally futile, in the case of convictions on the date on which the Ordinance was due to expire. The consequences of such an interpretation have only to be stated for its absurdity to become apparent, and I have no hesitation on holding that the interpretation that the petitioner would have us put on section 72 cannot possibly be the correct interpretation.

It is true that a penal statute should be strictly construed, but it is none the less true that every statute, whether penal or not, should be construed in a manner consistent with common sense, and that if the intention of the legislature is not apparent from the words of the statute itself, it ought to be presumed to have been such as is consistent with reason and justice. If this test be applied to the provisions of section 72, it is clear that the legislature can never have intended that sentences authorised by an Ordinance should not extend beyond the term of the Ordinance, or that such sentences should automatically expire with the expiration of the Ordinance. The section will not bear the interpretation sought to be put on it by the petitioner, and that interpretation cannot be accepted as correct.

It was also suggested, on behalf of the petitioner, that, as an Ordinance is necessarily based on the existence of a state of emergency, it ought to cease to have effect as soon as the emergency is over, and that sentences imposed under the provisions of an Ordinance ought logically to terminate with the termination of the Ordinance. The argument is clearly fallacious for the reasons already indicated, and does not call for further comment.

Before leaving the case I ought perhaps to refer to another argument that was urged before us by the learned advocate appearing on behalf of the petitioner. It was pointed out that the Defence of India Act of 1915 and the Emergency Powers Act of 1920 were temporary statutes, which, like Ordinance II of 1932 contained provisions by which offences were created and made punishable with imprisonment, and that both these Acts contained special provisos to the effect that penalties imposed thereunder should not be affected by the expiry of the Acts, or (in the case of the Emergency Powers Act) of the Regulations framed thereunder. It was contended that the fact that such provisos were considered necessary in the case of those two Acts shows that if it is intended that punishments inflicted under the provisions of temporary statutes

1933

Jogendrachandra Ray v. The Superintendent of the Dum Dum Special Jail.

Patterson J.

should be given effect to after the expiry of those statutes, it is necessary that this should be specifically stated. I do not agree with this contention, for, having regard to the rule of construction indicated in *Steavenson* v. *Oliver* (1) and already referred to in the earlier portion of this judgment, I am of opinion that the provisos in question were not really necessary and that they were merely inserted (as is frequently done in the case of provisos and saving clauses) as a precaution against misinterpretation of the intention of the legislature. Moreover, I find that out of some twelve Ordinances promulgated between 1922 and 1932 by which, *inter alia*, offences were created and penalties provided, only two, *viz.*, Ordinances IV and VIII of 1930, contain provisos of the nature indicated above. These two Ordinances related to martial law and empowered the military authorities to frame regulations creating offences and imposing penalties, but I have been unable to discover any possible reason why the provisos in question were inserted in these two Ordinances and not in the others. In these circumstances, I do not think it is possible to draw any such inference as the learned advocate for the petitioner would have us draw from the fact that the Emergency Powers Act and the Defence of India Act contain provisos of the nature indicated above.

The petitioner has, in my opinion, failed to show that the sentence of imprisonment passed on him was illegal or that is ceased to have effect on the expiry of the term of the Ordinance. The Rule ought, therefore, to be discharged.

PANCKRIDGE J. I agree.

Rule discharged.

A. C. R. C.

(1) (1841) 8 M. & W. 234 ; 151 E. R. 1024.