

ARUMUGA  
GOVINDAN  
v.  
VENKATA  
SUBBIAH  
1907  
October 17

were cross-examined on the depositions given by them before the Sub-Magistrate and re-examined, but there the order was substantially passed on what was not legal evidence. In my opinion under these circumstances both the orders of the First-class Magistrate were made without jurisdiction and must be set aside, and the Magistrate must be directed to take the cases again on his file and hold a fresh inquiry as to possession under section 145, clause 4 of the Code of Criminal Procedure.

## APPELLATE CRIMINAL.

*Before Mr. Justice Benson and Mr. Justice Sankarón Nair.*

### THE PUBLIC PROSECUTOR PETITIONER.\*

*Criminal Procedure Code, Act V of 1898, ss. 394, 395—Magistrate cannot award imprisonment in lieu of whipping when on certificate of the Medical officer before infliction of whipping the sentence of whipping is reduced.*

The power of a Magistrate under section 395 of the Code of Criminal Procedure to award imprisonment in lieu of whipping is confined to cases in which under section 394 a sentence of whipping is wholly or partially prevented from being executed.

Such power only exists when, under section 394 (1), a Medical Officer present certifies that the offender is not in a fit state of health to undergo such punishment or when, under section 394 (2) during the execution of the sentence, a Medical officer certifies that the offender is not in a fit state of health to undergo the remainder of the sentence.

There is no provision of law which authorise a Medical officer to certify, before the infliction of whipping, that the prisoner is fit to undergo only a smaller number of stripes than that actually ordered.

Where in consequence of such a certificate a smaller number of stripes is inflicted, the Magistrate has no power to award imprisonment in lieu of the whipping not inflicted.

THE facts of this case are sufficiently stated in the judgment.

JUDGMENT.—The accused Mahomed Kutti was found guilty of theft and sentenced by the District Magistrate of the Nilgiris to

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\* Criminal Revision Case No 417 of 1907 presented under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the judgment of the District Magistrate of the Nilgiris, dated 30th July 1907, in Summary Case No. 4 of 1907.

receive 20 stripes. The Medical officer certified that he was unfit to receive 20 stripes but was fit to receive 6 stripes. These have been inflicted and, in lieu of the balance of 14 stripes, the District Magistrate has sentenced the prisoner under section 395 of the Criminal Procedure Code to 3 months' rigorous imprisonment.

THE  
PUBLIC  
PROSECUTOR.

We are of opinion that the District Magistrate was not authorized by the terms of section 395 of the Criminal Procedure Code to pass this sentence.

Under the above section, a Court may sentence the offender to imprisonment in lieu of whipping or in lieu of so much of the sentence of whipping as was not executed in any case in which under section 394 a sentence of whipping is wholly or partially prevented from being executed. It is wholly prevented from being executed when under section 394, clause (1), a Medical officer certifies that the offender is not in a fit state of health to undergo the punishment of whipping: as in that case the section enacts that the punishment of whipping shall not be inflicted. The certificate in the case now before the Court is obviously not such a certificate. The sentence of whipping is partially prevented from being executed if, during the execution of a sentence of whipping, the Medical officer certifies that the offender is not in a fit state of health to undergo the remainder of the sentence. In the present case the Medical officer did not certify that the offender was unfit to undergo further punishment after the sentence of whipping was partially executed and the certificate is therefore not one granted under the terms of section 394, clause (2).

There is no provision of law authorizing a Medical officer to give such a certificate as was given in this case before the whipping commenced, and as we are unable to accept the certificate in this case as one granted either under section 394, clause (1), or section 394, clause (2), the sentence was not prevented from being carried out under that section. Section 395 does not therefore apply and the Magistrate was not empowered to sentence Mahomed Kutti to imprisonment.

The sentence of imprisonment is therefore set aside, and as the remainder of the sentence of whipping cannot be carried out, Mahomed Kutti will be discharged.

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