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MADHAVAN NAYAR, J.

place, he could not be asked to pay any new licence fee for erecting the machinery there."

The learned Judge in overruling this argument made the following observation :—

"I do not agree with this connexion because the two things are different, the one is an annual payment of the licence fee for the use of the machinery and the other is a payment once for all for erecting the machinery and the fact that the payment was made in the one case is no excuse for not paying in the second time."

I think these observations may well be applied in considering the arguments advanced in the case before us.

For these reasons, I would respectfully differ from the decision in Criminal Revision Case No. 503 of 1925. The other question raised in that case, viz., whether the machinery falls within clause (*q*) of schedule V does not arise in the present case as already indicated. I would therefore return this reference and the connected cases to the District Judge and ask him to deal with the case in the light of the above observations.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace and Mr. Justice Madhavan Nayar.

1926, September 3.

In re MAYANDI THEVAN, APPELLANT.*

Criminal Tribes Act (VI of 1924), *sec.* 23—*Conviction under sec.* 23 (1) (*b*)—*Second and third convictions—If should be after accused's tribe is declared or accused registered as member of criminal tribe—Reduction of sentence—"Special reasons to the contrary"—Character of.*

For the conviction of an accused person under section 23 (1) (*b*) of the Criminal Tribes Act (VI of 1924) it is not necessary that both the second and the third convictions should be

* Criminal Appeal No. 203 of 1926.

after the tribe to which the accused belongs had been declared a criminal tribe or after the accused was registered as a member of a criminal tribe.

The mere fact that the offence is not of a very serious nature cannot form a "special reason to the contrary" for reducing the sentence. Such a special reason must be something apart from the nature of the offence such as, youth, age, illness, or sex.

Criminal Appeals Nos. 318 and 367 of 1925 followed.

Reference No. 17 of 1924 dissented from.

Section 23 (1) runs as follows :—

Whoever being a member of any criminal tribe and having been convicted of any of the offences under the Indian Penal Code specified in schedule I, is convicted of the same or of any other such offence shall, in the absence of special reasons to the contrary which shall be stated in the judgment of the Court, be punished,

(*a*) on a second conviction, with imprisonment for a term of not less than seven years, and

(*b*) on a third or any subsequent conviction, with transportation for life:

Provided that not more than one of any such convictions which may have occurred before the 1st day of March 1911, shall be taken into account for purposes of this sub-section.

APPEAL against the order of the Court of the Assistant Sessions Judge of the Madura Division in case No. 93 of the calendar for 1925.

Public Prosecutor for the Crown.

No one appeared for the accused.

JUDGMENT.

The appellant in this case has been convicted on the unanimous verdict of a jury of offences under sections 457 and 380, Indian Penal Code, and sentenced to rigorous imprisonment for seven years. It was held that he broke into prosecution witness 1's house and stole a ram therefrom. There is no misdirection in the charge and none is urged in the appeal petition. The

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only question for consideration is the question of sentence.

The appellant is a member of a notified criminal tribe and has had two previous convictions, both subsequent to 1911. *Prima facie* therefore the sentence which ought to have been passed on him for a third conviction is, under section 23 of Act VI of 1924, transportation for life. Notice was served on him to show cause why the sentence imposed should not be enhanced. The Sessions Judge has given no reasons for not imposing the sentence of transportation for life.

In a judgment of this bench in Reference No. 17 of 1924 we held that, when an accused person was a member of a criminal tribe but was not registered as such until 1923, his second and third convictions must be convictions after his registration, and not merely his second and third convictions, "he being a member of a criminal tribe" since, if the latter view prevailed, section 23 (1) (*b*) could be applied before (1) (*a*) had been applied. By the proviso all convictions prior to 1st March 1911 count as one. If the second conviction may be a conviction *after* 1st March 1911 but *before* the tribe is declared a criminal tribe, then at the time of the conviction section 23 (1) (*a*) would not be applied; but if the third conviction was *after* the tribe was declared a criminal tribe, then, if mere membership of a criminal tribe operates to bring section 23 into force for a third conviction, section 23 (1) (*b*) must be applied although (1) (*a*) had not yet been applied. This seemed to us to indicate that what the section really meant was that both the second and third convictions should be after the tribe to which the accused belongs had been declared a criminal tribe or after the accused was registered a member of the criminal tribe. The correctness of this ruling was, however, doubted by a member of another bench in

Criminal Appeals Nos. 318 and 367 of 1925, DEVADOSS, J., holding with us and WALLER, J., taking the other view. In this difference of opinion the matter was placed before a third Judge, the learned CHIEF JUSTICE, who upheld the view of WALLER, J., and pointed out that the statute did in words distinguish, when it intended to do so, between a member of a criminal tribe and a registered member of a criminal tribe—compare section 23 with sections 22, 24 and 25. We think there is considerable force in this point, though it does not wholly get over the difficulty that in certain cases section 23 (1) (*b*) will apparently have to be applied before section 23 (1) (*a*) has been applied. We are not prepared to press our previous view which was, we admit, partly induced by a reluctance to suppose that the legislature intended such an extreme severity as the Act would seem to imply.

We have called for the notification under which the tribe of this accused was notified as criminal. It is dated 5th June 1918 and the accused was apparently registered on 14th July 1920. The fact that he was a member of a criminal tribe seems to have been overlooked by the First-class Magistrate of Usilampatti who convicted him, his second conviction, on 20th December 1923 and sentenced him to 18 months' rigorous imprisonment. He ought then to have sentenced him to an imprisonment of not less than 7 years. Now undoubtedly the only legal sentence which can be imposed on him is transportation for life, unless the Court is satisfied that there are special reasons for reducing the sentence. We cannot think that the mere fact that his offence is not of a very serious nature, that is to say, housebreaking and not robbery or dacoity, can form a special reason for reducing the sentence. Such special reasons must in our view be something apart from the

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nature of the offence, such as, youth or age or illness or sex. The Act clearly implies that on a third conviction of an offence under schedule I the punishment to follow is transportation for life. We must therefore enhance the sentence on the accused to one of transportation for life.

At the same time we feel that the sentence is unduly harsh and doubt if the framers of the Act really intended such a result. It means, for instance, that for, say, three separate thefts of a goat, the three goats being worth perhaps Rs. 9 in all, at different times, a man may be sentenced to transportation for life. The result of enforcing such penalties must be, we feel sure, a crop of recommendations to Government to reduce the sentences and we would suggest that the better course would be to consider whether the extreme rigour of the Act may not be mitigated by fresh legislation. In the present case we intend to move the Government to reduce the sentence to rigorous imprisonment for seven years which, we think, is an adequate sentence even for a member of a criminal tribe in the circumstances of this case, and we shall do so accordingly.

B.C.S.