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MA NYUN, MA SAN AYE v. MAUNG SAN THEIN, U SHWE SOE AND SIXTEEN.

MAUNG BA, J.

the *Manugye* and other *Dhammathats* already mentioned.

My answer to the question referred is therefore that the the marriage is automatically dissolved on the expiration of the three years from the date of desertion and no further expressed act of volition is necessary.

RUTLEDGE, C.J.—I concur.

CARR, J.—I concur.

MYA BU, J.—I concur.

BROWN, J.—I agree in the answer proposed to the reference by my learned brother Maung Ba, and in his interpretation of section 17 of Book V of the *Manugye*. Reference was made in the course of the argument before us to the case of *U Tun Aung Gyaw* v. *Ma Saw Kin and two* (Civil First Appeal No. 192 of 1923). I was a member of the Bench which decided that case, and we held that no divorce had taken place though there was evidence that the parties to the marriage had lived apart for more than three years. But the reason which led me to that conclusion was that in my opinion no desertion had been proved, my view being that mere living apart for the prescribed period would not necessarily prove desertion by either party. What amounts to desertion is not a question which arises on the present reference.

I agree that when there has been a desertion for the prescribed period, no further act of volition is necessary to affect a dissolution of marriage.

APPELLATE CRIMINAL.

Before Mr. Justice Carr.

SHWE WA

v.

C. I. MEHTA AND ONE.*

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June 13.

Criminal Procedure Code (Act V of 1898), s. 520—High Court whether competent to order restitution of property returned under section 517—Property in the possession of third party—Procedure to be adopted before ordering return under section 517.

Held, that where the question of right to possession is not one between the complainant and the accused but between the complainant and a third person, an order for the restoration of the property to the complainant should not be made without first giving the third party an opportunity of being heard.

Held, further, that the High Court on appeal can order restitution of property, restored to one party under section 517 of the Criminal Procedure Code.

Kyin Tan v. *E Cho*, 4 L.B.R. 14—*dissented from.*
Ma Thein Nu v. *Ma The Hnit*, 12 B.L.T.—*followed.*

Tun Aung—for Appellant.
Gregory—for Respondents.

CARR, J.—The facts of these two cases are very similar and quite straightforward. In each case the respondent entrusted certain articles of jewellery with one Maung Shwe Yin, who committed criminal breach of trust in respect of them and pawned the articles now in dispute at the pawnshop of the appellant. These articles were seized by the police and produced before the Court on the trials of Shwe Yin under section 406, Indian Penal Code. Shwe Yin was convicted in both cases on the 22nd March 1927, and at the time of passing judgment the Magistrate directed that the articles in question should be returned to the complainant in the case, *i.e.*, to the present respondent.

* Criminal Appeals Nos. 594 and 595 of 1927.

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As required by section 517 (3) of the Criminal Procedure Code these orders were not carried out until one month had elapsed. The articles were delivered to the respondents on the 25th and 26th April.

After this, on the 29th April, the appellant applied for the return of the articles to him. His applications were rejected on the ground that the articles had been returned to the complainants, and he now appeals. I am by no means sure that under the terms of section 520 of the Code an appeal lies, but the matter is one which can properly be dealt with in revision, so I will not discuss this question further.

Probably the Magistrate's last order in the case was correct, since he himself was *functus officio* and had no further jurisdiction. But his first order seems to me clearly wrong. In the first place, in such a case as the present, in which the question of the right to possession is not one between the complainant and the accused but one between the complainant and a third person, an order for the restoration of the property to one party should not be made without first giving the opposite party an opportunity of being heard. The present appellant was not a party to the criminal proceedings but was merely a witness in them. He could hardly be required to keep in such close touch with the proceedings as to be aware at once of their conclusion, but unless he does so he is, in the absence of notice, liable to suffer through his interests not being brought to the notice of the Court.

Secondly the Magistrate's order was wrong on the merits. The circumstances were such that under section 178 of the Contract Act the pledges to the appellant were valid, if in accepting them he acted in good faith. It has not been suggested in this Court that he did not act in good faith, nor does there seem

to be anything in the trial record to suggest absence of good faith. So far as the record goes therefore, the pledges were valid as against the owners of the property and the appellant was entitled to retain possession of the property until the amounts due on pledges were repaid. The Magistrate should therefore have returned the properties to the appellants and not to the complainants.

This is a well-established principle. See the cases of *S. Ariet* v. *K.E.* and *D. Manuel* (1), *R.M.P.A. Anamale Chetty* v. *Mrs. Basch* (2), and *K.E.* v. *Po Chit* (3).

The properties have, however, been actually returned to the complainant-respondents and for them it is argued by Mr. Gregory that this Court has now no power to deal with the matter and has no power to deal with the matter and has no power to order restitution. For the first part of this contention he relies in the words in section 520 of the Code—"Any Court of appeal . . . . may direct any order under section 517 . . . . to be stayed pending consideration by the former Court." His argument is that when the order has been carried out it clearly cannot be suspended and the Court of appeal has no jurisdiction at all. I am unable to accept this contention or to hold that the suspension of the order is a necessary preliminary to the exercise by the Court of appeal of the powers conferred by the last words of the section, *viz.*, "and may modify, alter or annual such order and make any further orders that may be just."

For the contention that the Court has no power to order restitution Mr. Gregory relies on the case of *Kyin Ton* v. *E Cho* (4), in which it was held by

(1) 4 L.B.R. 25.
(2) 11 L.B.R. 217.
(3) (1923) 1 Ran. 199.
(4) 4 L.B.R. 14.

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Hartnoll, J., that the High Court had no such power. That decision was reviewed by the present Chief Justice of this Court in *Ma Thein Nu* v. *Ma The Hnit* (1), in which the learned Judge held, following the cases of *Kirpal Singh* v. *Labhu* (2) and *Sheonandan Singh* v. *Bholanath* (3), that the High Court has power to order restitution. This decision was in fact *obiter*, but the reasoning contained in the judgment and in the cases relied upon commends itself to me as correct. In my opinion the decision in *Kyin Ton's* case was wrong. The learned Judge seems to have overlooked the last words of section 520—"may . . . . make any further orders that may be just." It is clearly just that when a subordinate Court has made over property to a person who is not entitled to its possession the High Court should remedy the error by restoring the property to the person properly entitled to its possession. No doubt the dispute between the parties cannot be finally settled by the Criminal Courts, but must, unless the parties come to a private agreement, be decided by a Civil Court. But even so it is unjust to the appellant that he should be deprived of the possession to which he is entitled and should be placed in such a position that he must himself institute the civil proceedings or else suffer the loss of his money.

Section 561A of the Code supports the view that this Court has the power to order restitution and I have no hesitation in holding that it has such power.

The case is somewhat complicated by the fact, stated by Mr. Gregory, that the complainant in one case has already returned to the actual owner some diamonds which were returned to him under the Magistrate's order. These diamonds were, he says,

(1) Cr. Rev. No. 235B of 1919. (2) 30 P.R. (1895).
(3) 18 C.W.N. 1147.

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made over to the complainant, who is a jeweller, to be set as buttons. Complainant passed them on to Shwe Yin to do the work. On return of the diamonds to him by the Court he has made them over to the actual owner. The owner is not before the Court and I do not think that any order binding on him can or should be passed. But it is necessary to place the appellant as nearly as possible in the position in which he was before he was deprived of the property by its seizure by the police and the subsequent erroneous order of the Magistrate. To attain that end I pass the following order.

I direct that each of the respondents do return to the appellant, through the trying Magistrate, such of the articles returned to him by that Magistrate as are still in his (respondent's) possession. I further direct that in respect of such articles as are not now in his possession each respondent do similarly pay to the appellant such sum of money as may be due on the pledges of such articles.

The order of the Magistrate directing return of the articles to the complainant-respondents is set aside.