

We are of opinion that the lower Court's finding that the property could be brought to sale without a suit on the mortgage bond was correct and we dismiss the appeal with costs, advocate's fee in this Court to be five gold mohurs.

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 HEALD AND
 MYA BU, JJ.

APPELLATE CRIMINAL.

Before Mr. Justice Carr.

NGA PO NGWE

v.

KING-EMPEROR.*

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Penal Code (Act XLV of 1860), s. 227—Burma Criminal Law Amendment (Conditionally Released Prisoners) Act (Burma Act III of 1928), s. 2—Facts to be proved for conviction under s. 227 of the Penal Code—Mode of proof—Retrospective effect of Burma Act III of 1928.

Where a person is to be convicted under s. 227 of the Indian Penal Code for violation of the conditions of remission of punishment, it is necessary to prove (a) that the accused person has been convicted and sentenced and (b) has been granted a remission of punishment, (c) the conditions on which the remission was granted, (d) the identity of the accused (e) the fact that the accused has committed a breach of a condition of the remission.

The first three facts must be proved by documentary evidence, *viz.*, a certified copy of the judgment as regards conviction and sentence, a certified copy of the order of remission, and of the bond executed by the accused. Oral evidence is inadmissible on these points. The identity of the accused and the breach of conditions may be established by oral evidence.

Quære: Whether s. 2 of Burma Act III of 1928 has retrospective effect.

CARR, J.—The respondent, Nga Po Ngwe, has been convicted under section 227 of the Penal Code of a breach of a condition of remission of punishment, and has been sentenced under that section and section 2 of Burma Act III of 1928 to nine months' rigorous imprisonment. The unexpired portion of his

* Criminal Revision No. 876 of 1929 being a review of the order of the third Additional Magistrate of Taungdwingyi in Criminal Regular No. 164 of 1928.

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original sentence was found to be four months and twenty-six days.

In a case under section 227 of the Penal Code it is necessary to prove the following :—

1. That the accused person has been convicted and sentenced. The conviction and its date and the sentence passed should, under Chapter V of the Evidence Act, be proved by documentary evidence, that is by the judgment in the case. The judgment being a public document it may, under section 65 (e) of the Evidence Act, be proved by a certified copy. But oral evidence to prove it is not admissible.

2. That the accused person was granted a remission of punishment. This again must be proved by documentary evidence, that is by the order granting the remission. Here also a certified copy of the order is admissible, but no other form of secondary evidence.

3. The conditions on which the remission was granted. This again is provable only as above, *i.e.*, by a certified copy of the order of remission. The bond executed by the accused should also be put in, or a certified copy of it.

4. The fact that the accused is the person convicted, sentenced and granted remission must be proved, and for this oral evidence is admissible.

5. The fact that the accused has committed a breach of a condition of the remission. This may also be proved by oral evidence, but obviously no breach can be proved until the condition itself has been proved as set out in head 3 above.

The trying magistrate has overlooked all the requirements of documentary evidence and allowed everything to be proved by oral evidence. But as the accused admitted all the facts I think it would be hypercritical to interfere on this ground, though

properly the accused should not have been questioned at all until proper evidence of the facts was on the record.

A further point arises in the case. The alleged breach of condition was committed before Burma Act III of 1928 was passed. It was contended by the accused that therefore he could not be sentenced under that Act but the Magistrate overruled that contention, though he gave no good reason for doing so. On the ordinary principles of Penal Legislation a penal provision does not have retrospective effect. The wording of section 2 of Burma Act III of 1928 is somewhat peculiar. It reads:—

“Whoever *is convicted* of absconding in violation of a condition of a remission of punishment under section 227 of the Penal Code shall, in addition to the punishment prescribed by that section, be punished by the convicting magistrate with rigorous imprisonment for a term which may extend to one year.”

This suggests that it is incumbent on the Magistrate to add some term of imprisonment to that prescribed by section 227, though the length of the term to be added is within his discretion. This point, however, is not of importance in the present case.

If the section were worded in the ordinary way that is, if it began “Whoever absconds in violation of a condition” I think there can be no doubt that it would not have retrospective effect, and that the additional sentence passed on the accused in this case was illegal. But the wording “Whoever is convicted of absconding” makes it arguable that section 2 of Act III applies to anyone convicted before the Act came into force and not only to an offence committed after that date. This interpretation, however, is so contrary to the accepted principles of penal legislation that I think it would be unsafe

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to accept it on grounds no stronger than are to be found in the section. I am not prepared, therefore, to hold that the section has retrospective effect.

I therefore reduce the sentence passed on Nga Po Ngwe to one of rigorous imprisonment for four months and twenty-six days.

APPELLATE CRIMINAL.

Before Mr. Justice Carr.

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 Mar. 12.

NGA MYA

v.

KING-EMPEROR.*

Magistrate's powers to pass sentence—Enhanced punishment under s. 2 of the Burma Criminal Law Amendment (Conditionally Released Prisoners) Act (Burma Act III of 1928)—Penal Code (Act XLV of 1860), s. 227—Enhanced punishment illegal, if beyond magistrate's powers.

S. 2 of Burma Act III of 1928 provides for enhanced punishment of rigorous imprisonment for a term which may extend to one year for absconding in violation of condition of remission of punishment. But it is illegal for a magistrate purporting to punish the accused under s. 227 of the Indian Penal Code and s. 2 of the Burma Act III of 1928 to pass a sentence in excess of that which he is empowered to pass.

CARR, J.—The respondent Nga Mya has been convicted under section 227 of the Penal Code and sentenced under that section and section 2 of Burma Act III of 1928 to rigorous imprisonment for two years, eight months and six days. The Magistrate who passed this sentence has ordinary first class powers and the maximum term of imprisonment that he can impose for one offence is two years. The sentence is therefore illegal. There is nothing in either section 227 of the Penal Code or Burma Act III of 1928 to empower any Magistrate to pass a

* Criminal Revision No. 86B of 1928 being a review of the order of the third Additional Magistrate of Taungdwingyi in Criminal Regular No. 159 of 1928.