1930

MEYAPPA CHETTYAR v. U TUN HLA.

CARR, J.

The exact argument raised before me does not appear to have been considered in any of these cases, but they are to some extent authority against the contention put forward by the petitioners, who have been unable to cite any authority whatever in favour of their contention.

In these circumstances I am not prepared to interfere in revision, and dismiss this application.

I wish, however, to express most emphatically the opinion that an application of this nature connot be utilized, as an indirect means of evading the provisions of Order XXI, Rule 2, of the Civil Procedure Code. I am somewhat inclined to think that this was really the main object of the application made in the Township Court, and for that reason I pass no order as to costs of this application.

APPELLATE CRIMINAL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Das.

KING-EMPEROR
v.
NGA PYE.*

Criminal Procedure Code (Act V of 1898) Ss. 123, 397— Sentence' in S. 397, meaning of—Detention under S. 123—Imprisonment for a subsequent offence—Sentences whether to be consecutive.

The word 'sentence' in Section 397 (and its provisos) of the Code of Criminal Procedure includes an order of committal to or detention in prison under S. 123 of that Code.

Emperor v. *Tula Khan*, I.L.R. 30 All. 334—*referred to.*

Criminal Revision Cases Nos. 393 and 466 of 1903, 2 Weir 452 ; *Emperor* v. *Arjun*, I.L.R. 34 Bom. 326 ; *Emperor* v. *Muthukomaran*, I.L.R. 27 Mad. 525 ; *Emperor* v. V. *Balkrishna*, I.L.R. 37 Bom. 178 ; *Joghi* v. *Emperor*, I.L.R. 31 Mad. 515 ; *King-Emperor* v. *Nga Po Thin*, 2 L.B.R. 72—*dissented from.*

* Criminal Reference No. 3 of 1931 arising out of Criminal Revision No. 252A of 1930 of this Court at Mandalay.

1930

KING-EMPEROR v. NGA PYE.

The following order of reference which contains the facts of the case and the point for determination, was made by Otter, J.

"In this case one Nga Pye was committed to prison for two years under section 123 of the Criminal Procedure Code on October 11th, 1928.

On January 12th, 1929, while undergoing this punishment, he escaped from confinement, was captured on the same day, and on February 17th, 1929, was convicted under section 224, Indian Penal Code, and sentenced to six months' rigorous imprisonment.

The question now is, ought the latter sentence to have run concurrently with the imprisonment awarded on October 11th, 1928, or should it run consecutively to it.

If the first alternative is correct, Nga Pye should be at once released; for (apart from remission) his sentence of February 17th, 1929, would have expired on or about August 16th, 1929, and the imprisonment awarded on October 11th, 1928, on or about October 10th, 1930; if the latter alternative is correct, there are still some months to run.

Section 396 of the Criminal Procedure Code says:—

"When a person already undergoing a sentence of imprisonment, penal servitude or transportation, is sentenced to imprisonment, penal servitude or transportation, such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been previously sentenced (unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence)".

The second proviso to that section enacts:—

"Provided, further, that where a person who has been sentenced to imprisonment by an order under section 123 in default of furnishing security is, whilst undergoing such sentence,

1930

KING-EMPEROR v. NGA PYE.

sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately".

It would seem perfectly clear, therefore, that under these provisions, the second alternative is correct, for the substantive offence under section 224 (of the Penal Code) was committed when Nga Pye was already undergoing a sentence of imprisonment, and the proviso to that section would not apply for the substantive offence was not committed *prior to the making of the order* under section 123. The matter is not concluded, however, at least so far as this Province is concerned.

It is well understood that the committal order under section 123 of the Criminal Procedure Code is not a punishment strictly so called, for no offence has been committed, and the confinement is ordered for the protection of the public.

This distinction is reflected in the Full Bench case of *King-Emperor* v. *Nga Po Thin* (1), the head note of which is—

"The word 'sentence' in section 395 or section 397, Code of Criminal Procedure, does not include an order of committal or detention under section 123, Code of Criminal Procedure."

This decision may have been responsible for paragraph 400 of the Jail Manual which is:—

"If a prisoner is sentenced to imprisonment in default of furnishing security for good behaviour under section 109 or 110 of the Criminal Procedure Code, while undergoing imprisonment for a substantive offence, the term of imprisonment in default of furnishing security shall be served after the substantive sentence has been given effect to. But, as imprisonment in default of furnishing security for good behaviour is a precaution for the safety of the public, and not a punishment for an offence, it must give place to, and run concurrently with, any subsequent sentence passed for a substantive offence."

(1) (1903-04) 2 L.B.R. 72.

Moreover, the conflict between this paragraph and the order in the present case directing that the substantive sentence should run concurrently, has prompted these proceedings.

The difficulty is that if the order passed on October 11th, 1928, was not in law a sentence, the case would not fall within section 397 (or 396) of the Criminal Procedure Code at all, and some principle other than that there laid down would be applicable.

On the other hand, the proviso to that section makes it perfectly clear that the legislature did not there contemplate any distinction between a sentence of imprisonment for an offence, and an order awarding imprisonment under section 123. This proviso was of course passed long after the decision in the case of *King-Emperor* v. *Nga Po Thin* and I think this authority and other relevant cases may be well reconsidered.

I refer, therefore, for the decision of a Full Bench or Bench, the following question :—

Does the word "sentence" in section 397 (and its provisos) of the Code of Criminal Procedure include an order of committal to or detention in prison within the meaning of section 123 of that Code ?

If the answer be in the affirmative, the sentence under section 224 must run consecutively ; if in the negative, he should have been released already.

In the meantime, therefore, I direct that Nga Pye be released on bail upon his furnishing security in two sureties Rs. 100 each to secure his appearance."

A. Eggar (Government Advocate) for the Crown.

In the first place, Section 225B was applicable to the case where a person committed to prison under section

1930

KING-EMPEROR v. NGA PYE.

123 of the Code of Criminal Procedure escapes. The reason for the introduction of this section into the Penal Code in 1886 was that, in 8 Cal. 331 and 7 All. 67, it had been held that section 224 would not apply to a case under the security sections, because the person under restraint was not detained for any "offence".

This reasoning was also, indirectly, relevant to the construction of section 397 of the Criminal Procedure Code as indicating that the Legislature in 1886 recognised the distinction between an accused sentenced for an offence and a person committed to prison by way of security. And, probably, Section 397 of the Criminal Procedure Code was not intended to apply to the latter case.

Case-law had revived the question; but in setting this at rest the Legislature, in 1923, did not appear to have appreciated the view that there was no need to exclude security cases from section 397. An express exclusion was made by the proviso for a particular case of security proceedings. Consequently, the Legislature must now be regarded as accepting the view that an order of commitment in security proceedings is a sentence within the meaning of section 397.

PAGE, C.J.—This is a reference in Criminal Revision No. 252A of 1930 by my learned brother Otter, J. in the following terms:—

"Does the word 'sentence' in section 397 (and its provisos) of the Code of Criminal Procedure include an order of committal to or detention in prison within the meaning of section 123 of that Code?"

On the 11th of October 1928 one Nga Pye was committed to prison for two years under section 123 of the Criminal Procedure Code. On the 12th of January 1929, while undergoing this imprisonment,

Nga Pye escaped from confinement, and on the 17th of February 1929 he was convicted by the Township Magistrate of Mônywa of an offence under section 224 of the Indian Penal Code, and sentenced to six months' rigorous imprisonment.

The question that falls for determination is whether the sentence of imprisonment passed upon him on the 17th of February 1929 should commence at the expiration of the term of imprisonment which he was ordered to undergo under section 123 of the Criminal Procedure Code, or should run concurrently with it.

Now, the determination of the question depends upon the true construction of section 397 of the Code of Criminal Procedure, which runs as follows:

"When a person already undergoing a sentence of imprisonment, penal servitude or transportation, is sentenced to imprisonment, penal servitude or transportation, such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence:

Provided that, if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of transportation, the Court may, in its discretion, direct that the latter sentence shall commence immediately, or at the expiration of the imprisonment to which he has been previously sentenced:

Provided, further, that where a person who has been sentenced to imprisonment by an order under section 123 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately."

The second proviso to the section was added by Act XVIII of 1923, section 106. Prior to the passing of this amendment divergent views were held by the High Courts in India as to whether an order of committal to, or detention in, prison under section

1930

KING-EMPEROR v. NGA PYE.

PAGE, C.J.

123 was a sentence of imprisonment within section 397.

The High Courts of Madras and Bombay and the the late Chief Court of Lower Burma held that such an order was not a sentence of imprisonment. (Criminal Revision Cases Nos. 393 and 466 of 1903 (1) *Emperor* v. *Muthukomaran* (2), *Joghi Kannigan* v. *Emperor* (3); *Emperor* v. *Arjun Ambo Kathodi* (4); *Emperor* v. *Vishnu Balkrishna Bam* (5), and *King-Emperor* v. *Nga Po Thin* (6). On the other hand, a Full Bench of the High Court of Allahabad held that an order of this nature was a sentence of imprisonment within section 397. *Emperor* v. *Tula Khan* (7). In the course of his judgment in *Tula Khan's* case Bannerji, J. observed :—

"Upon the second question, namely, whether an order of imprisonment in default of giving security for good behaviour is a sentence within the meaning of section 397, I entertain some doubts. A sentence of imprisonment ordinarily implies punishment for an offence committed, and therefore imprisonment for failure to furnish security cannot be regarded as a sentence in the ordinary sense of that word . . . . . .

It seems, however, that the Legislature used the word 'sentence' in section 397 in a wide sense. If it were held that the word did not include imprisonment in default of furnishing security, a person undergoing such imprisonment may practically escape punishment for an offence of which he may be subsequently convicted. Section 120 of the Code of Criminal Procedure cannot apply to such a case, and surely it could never have been intended that he should go unpunished." [see also *The Emperor* v. *Nepal Shikary* (8)].

It would serve no useful purpose to discuss and determine which of these conflicting views we are disposed to think is correct; for, in our opinion, it

(1) 2 Weir, p. 452.
(2) (1904) I.L.R. 27 Mad. 525.
(3) (1904) I.L.R. 31 Mad. 515.
(4) (1910) I.L.R. 34 Bom. 326.
(5) (1913) I.L.R. 37 Bom. 178
(6) (1903-04) 2 L.B.R. 72.
(7) (1903) I.L.R. 30 All. 334.
(8) 13 C.W.N. 318.

is apparent from the language in which the second proviso to section 123 is couched that it was the intention of the legislature that the view taken by the Allahabad High Court should prevail and that an order of committal to, or detention in, prison passed under section 123 should be deemed to be a sentence of imprisonment within section 397 of the Code of Criminal Procedure. An order committing a person to, or detaining him in, prison under section 123 in default of furnishing security is therein referred to as a sentence of imprisonment. To hold otherwise would be to construe the words "sentence of imprisonment" in section 397 in a sense plainly inconsistent with the terms of section 397 as amended, and with the intention of the legislature as to the interpretation to be placed upon these words in section 397 to be collected from the language used in the second proviso to the section. The effect of holding that such an order is not a sentence of imprisonment, where, as in the present case, a person undergoing imprisonment under an order of this nature is subsequently sentenced to a term of imprisonment for an offence committed after the making of the order, might well be that he would go unpunished for the later offence. That never could have been intended.

For these reasons we answer the question propounded in the affirmative. We are further of opinion, that the offence proved against Nga Pye was under section 225B, and not 224 of the Indian Penal Code, and we set aside the conviction and sentence under section 224, convict Nga Pye of an offence under section 225B, and sentence him to suffer six months' rigorous imprisonment.

DAS, J.—I agree.