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U NANDA
v.
U GANDA.

PAGE, C.J., DAS AND MAUNG BA, JJ.

the Sangha as a whole was of opinion that he had been guilty of such misconduct as would render him unfit to remain as a member of the Sangha—and it is the second view which as at present advised we are disposed to take—we are clearly of opinion upon the evidence adduced and in the circumstances obtaining in this case that it was not proved that at the time when the suit in ejectment was filed the defendant had been guilty of such misconduct as would render him liable to ejectment at the suit of the plaintiff.

In these circumstances, in our opinion, the appeal must be allowed, and the suit dismissed. There will be no order as to costs.

APPELLATE CRIMINAL.

Before Mr. Justice Maung Ba and Mr. Justice Dunkley.

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Jan. 9.

TIRI
v.
KING-EMPEROR.

Youth whether an extenuating circumstance in case of murder—Lesser penalty when justifiable.

In cases of murder youth alone is not such an extenuating circumstance as would justify the imposition of the lesser penalty, but it should be taken into consideration with the other facts of the case.

Chit Tha v. *King-Emperor*, 9 L.B.R. 165 ; *Nga Ba Thin* v. *King Emperor*, Ch. Ct. Cr. App. 110 of 1922 ; *Nga Kan Hla* v. *King-Emperor* (1914-16) U.B.R. 28 ; *Nga Pyan* v. *Crown*, 1 L.B.R. 359 ; *Nga Tha Kin* v. *King-Emperor* (1910-13) U.B.R. 87—*referred to.*

Mukerji for the appellant.

Gaunt (Assistant Government Advocate) for the Crown.

MAUNG BA and DUNKLEY, JJ.—The appellant has been convicted of murder, under section 302 of the

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* Criminal Appeal No. 1329 of 1930 from the order of the Sessions Judge of Amherst in Sessions Trial No. 15 of 1930.

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Indian Penal Code, and sentenced to death. The person whom he has been found guilty of murdering was his own uncle, Maung Kya Lon. It appears that about 10 days before the commission of the crime the appellant had a dispute with his uncle because the latter had stopped the flow of water in a channel which separates the deceased's paddy-land from the appellant's father's land. On the early morning of the 23rd June, while the deceased was quietly ploughing his fields, the appellant approached him from behind and dealt him a terrific blow on the back of his neck with a *dah*. The appellant then absconded, and went to a distant village, and was arrested only on 2nd July. The injury was an incised wound seven inches long, three-quarters inch broad, cutting right through the spine and the spinal cord at the level of the 5th vertebrae. Death must have been practically instantaneous.

Nan Palaw (1st P. W.), the wife of the deceased was in her hut, which is only 198 feet from the scene, at the time of the occurrence. She heard the sound of the blow, and on looking out she saw her husband on the ground and the appellant standing close to him, holding a *dah*. The appellant ran away at once. Maung Myaing Sein (5th P. W.) was working in his field at the time, and could see the deceased ploughing. He saw the appellant going towards the deceased from the latter's rear. He took no particular notice, and went on with his work. Shortly afterwards he heard deceased's wife shout, and he then looked up and saw appellant running away across the paddy-field, about 20 fathoms distant from the place where deceased had been ploughing. Maung Chit (4th P. W.) was sitting in front of his hut at the time. He heard the cries of deceased's wife, and

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ran towards the scene. He then saw the appellant running away across the paddy-field. The evidence of these three witnesses establishes beyond doubt that the appellant was the person who cut the deceased, and the appellant was undoubtedly guilty of murder.

We have been asked to reduce the sentence passed on the appellant to transportation for life, on the ground of his age, and the fact that he delivered only one blow, and did not behave in a specially cruel manner. The appellant himself has given his age as 16. The Sub-Assistant Surgeon who examined him has stated that the appellant is about 18 years of age. His wisdom teeth have, however, not yet made their appearance, and consequently the appellant is probably still under eighteen. In the case of *Nga Pyan* v. *Crown* (1), where a youth of not more than seventeen committed a murder under ferocious circumstances, it was held that to refrain from confirming a sentence of death in such a case on account of the criminal's youth would be an act of pure mercy. In *Chit Tha* v. *King-Emperor* (2) it was laid down that ordinarily youth is in itself an extenuating circumstance. In that case murder was committed by a youth of 17 on a sudden impulse without premeditation. In the Upper Burma cases of *Nga Tha Kin* v. *King-Emperor* (3) and *Nga Kan Hla* v. *King-Emperor* (4), it was held that the youth of the accused is an extenuating circumstance which a Court can properly take into consideration in determining the punishment to be awarded for murder. In the former case, the murder was committed without premeditation and in the heat of a quarrel, and the sentence was therefore reduced to transportation for life. In the latter case the accused

(1) 1 L.B.R. 359.
(2) 9 L.B.R. 165.
(3) 1910-13) U.B.R. 87.
(4) (1914-16) U.B.R. 28.

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acted with great ferocity, and it was held that reduction of sentence on the ground of the accused's age was not justified. We consider that the correct principles were laid down in an unreported case of the late Chief Court, *Nga Ba Thin* v. *King-Emperor* (1), where it was held that youth alone in every case is not such an extenuating circumstance as would justify the imposition of the lesser penalty in cases of murder, but it should be taken into consideration with the other facts of the case. The facts of that particular case were very similar to those of the present case. In the present case the attack on the deceased was made in consequence of a petty dispute which had occurred about fortnight previously, and was obviously premeditated. The murder was perpetrated in a cold-blooded manner. While the deceased was peacefully engaged in his daily occupation and was unarmed, the appellant approached him stealthily and cut him down from behind, with a most savage blow, without giving the deceased any chance of defending himself. In the case of a cold-blooded and premeditated murder of this description we do not consider that we should be justified in inflicting the lesser penalty solely on the ground of the youth of the appellant.

This appeal is therefore dismissed.

(1) Cr. App. No. 110 of 1922.