

APPELLATE CRIMINAL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and
Mr. Justice Dunkley.

NGA KYAN *v.* KING-EMPEROR.*

1936

Aug. 25.

Whipping and Imprisonment—Combination of sentences—Maximum sentence of seven years' imprisonment—Whipping in addition—Magistrate's powers—Offence of grievous hurt—Criminal Procedure Code (Act V of 1898), ss. 30, 32 (2), 34—Whipping (Burma Amendment) Act, 1927 (Act VIII of 1927), s. 3.

A magistrate specially empowered under s. 30 of the Code of Criminal Procedure can pass a sentence of whipping in addition to the maximum sentence of seven years' imprisonment for the same offence, which he is competent to inflict under s. 34 of the Code. Under s. 32 (2) of the Code a magistrate may pass any lawful sentence, combining any of the sentences which he is authorized by law to pass. A person who commits an offence under s. 326 of the Indian Penal Code may therefore be sentenced by a magistrate duly empowered to a term of imprisonment not exceeding seven years and in addition to a sentence of whipping.

Ba Han (Assistant Government Advocate) for the Crown. Under s. 32 (2) of the Criminal Procedure Code a magistrate may pass any lawful sentence, combining any of the sentences which he is authorized by law to pass. The Whipping (Burma Amendment) Act, 1927 (Act VIII of 1927) extends the scope of s. 4 of the Indian Whipping Act, 1909, and of s. 393 (b) of the Code of Criminal Procedure. Hence for an offence punishable under s. 326 of the Indian Penal Code whipping may be inflicted in lieu of or in addition to any of the punishments prescribed in the Indian Penal Code. S. 34 of the Code of Criminal Procedure enables a magistrate, specially empowered under s. 30, to pass any sentence authorized by law, except a sentence of death or of transportation for a term exceeding seven years, or imprisonment for a term exceeding seven years.

* Criminal Appeal No. 953 of 1936 from the order of the Subdivisional (Special Power) Magistrate of Ye-U in Criminal Trial No. 20 of 1936.

Therefore a specially empowered magistrate, who is of necessity a first class magistrate, may pass a sentence of imprisonment not exceeding seven years. This section enlarges the term of two years given by s. 32 to seven years. It does not take away the power of the magistrate to inflict a fine up to Rs. 1,000 and a sentence of whipping. Therefore a special power magistrate can combine the maximum term of imprisonment with fine and whipping.

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GOODMAN ROBERTS, C.J.—This is an appeal by Nga Kyan, who was sentenced by the learned Subdivisional Magistrate at Ye-U for the offence of voluntarily causing grievous hurt contrary to section 326 of the Indian Penal Code upon one U San Nyun who was an Honorary Assistant Myoök at Tabayin. The case is of some importance because the question has arisen whether a Magistrate who is specially empowered under section 30 of the Code of Criminal Procedure may pass a sentence of whipping in addition to the maximum sentence of seven years' imprisonment for the same offence.

Section 34 of the Code of Criminal Procedure lays down that :

“The Court of a Magistrate, specially empowered under section 30, may pass any sentence authorized by law, except a sentence of death or of transportation for a term exceeding seven years or imprisonment for a term exceeding seven years.”

It is clear, therefore, that so far as imprisonment is concerned the period of seven years must not be exceeded, but any sentence authorized by law under section 32 (2) of the Code of Criminal Procedure is permissible, and that sub-section expressly lays down that “the Court of any Magistrate may pass any lawful sentence, combining any

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of the sentences which it is authorized by law to pass." A sentence of imprisonment may therefore be combined with one of whipping if the offence is punishable with whipping in addition to any other punishment to which the offender may be liable under the Indian Penal Code. Looking at section 3 of Burma Act VIII of 1927, it is clear that a person who commits an offence under section 326 of the Indian Penal Code may be punished with whipping in addition to any other punishment to which he may be liable. He may therefore be sentenced to a term of imprisonment not exceeding seven years and in addition to a sentence of whipping.

Some reference has been made to a case in which the question of the comparative severity of whipping and imprisonment came up for consideration, and it was laid down that as a guide a certain number of lashes might be taken as the equivalent of a certain number of months' imprisonment. This guide, which is of importance when questions of commutation of sentences have to be considered, is of no application in a case where a Magistrate is lawfully combining two different kinds of sentences in accordance with the powers under section 32 (2) of the Code of Criminal Procedure.

Passing to consider the case under appeal therefore, we have no doubt that we could, if the circumstances render it desirable, permit this sentence to stand in its entirety both as regards the whipping and as regards the imprisonment. The attack which the appellant made upon U San Nyun was a particularly brutal one: his victim was an old man of 64 who was an Honorary Assistant Myoök, and, as the Subdivisional Magistrate pointed out, was only doing his duty as an officer of the Government at the time

when he was attacked : no fewer than 18 wounds were inflicted upon him : his life was in danger for over a month : he lost the use of his right shoulder joint : his little finger was cut off : and he lost the use of his left hand. But one of the factors which the learned Subdivisional Magistrate took into consideration was not only the age but the position of the victim. In the examination of the appellant he said that he did not know that U San Nyun was an Honorary Assistant Myoök. We think that this question was never really investigated, and although it is very probable that the prosecution could have proved knowledge on the part of the appellant as to the identity of his victim, they failed to do so, and in those circumstances the learned Subdivisional Magistrate should not have taken it into account in awarding the sentence. We are, however, impressed with the enormity of the offence and the brutal circumstances in which it was inflicted, and we think in the circumstances the proper sentence is that the accused suffer six years' rigorous imprisonment, and the sentence of whipping shall stand.

DUNKLEY, J.—I agree.

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