

CRIMINAL REVISION.

*Before Mr. Justice Dunkley.*KING-EMPEROR *v.* AH HTWE.*1936
Jan. 3.

Prevention of Crime (Young Offenders) Act (Burma Act III of 1930), ss. 10, 25 (1)—Sentence of imprisonment by magistrate—Alteration on appeal to order of detention in Borstal school—Period of detention exceeding length of sentence of imprisonment—Not an enhancement of sentence—Detention in Borstal school not a sentence of imprisonment—Criminal Procedure Code (Act V of 1898), s. 423 (1) (b) (3).

Under s. 10 of the Prevention of Crime (Young Offenders) Act a Court of Session on appeal has jurisdiction to order detention of a juvenile accused in a Borstal school for any period which is legal under the provisions of sub-section (1) of s. 25, irrespective of the length of the sentence of imprisonment which has been passed by the magistrate from whose judgment the appeal is brought. An order of detention in a Borstal school is not a sentence of imprisonment. Such an order for any period permitted by the provisions of the Act in substitution of the sentence of imprisonment, though exceeding the period of imprisonment imposed by the magistrate, does not amount to an enhancement of the sentence within s. 423 (1) (b) (3) of the Criminal Procedure Code.

Lambert (Assistant Government Advocate) for the Crown.

DUNKLEY, J.—The respondent, Ah Htwe *alias* Sein Htwe, was convicted by the First Additional Magistrate of Pa-an of the offence of cattle theft, under section 380 of the Indian Penal Code, and was sentenced to two years' rigorous imprisonment. As pointed out by the learned Sessions Judge on appeal, the Magistrate entirely failed to consider the provisions of the Prevention of Crime (Young Offenders) Act, 1930, although the respondent had stated in his examination that his age was seventeen years. Consequently, the learned Sessions Judge ordered an enquiry into the age of the respondent, and as a

* Criminal Revision No. 774A of 1935 from the judgment of the Sessions Judge, Thaton, in Cr. Appeal No. 303 of 1935.

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result of this enquiry he came to the conclusion that the respondent was eighteen years of age at the time of his conviction, having been born on the 1st January, 1917. He then took action under the provisions of section 25, sub-section (1), of the Prevention of Crime (Young Offenders) Act, and changed the sentence of two years' rigorous imprisonment passed upon the respondent to an order directing that the respondent should be sent to the Borstal School at Thayetmyo for a period of two years. The learned Sessions Judge was well aware of the rules under the Act and the instructions which have been issued from time to time, and recognized that a period of two years was not a sufficient period of detention in a Borstal School. Apparently, although he has not specifically so stated, he feared that if he ordered detention for a period of more than two years, he would be held to have enhanced the sentence passed by the Magistrate upon the respondent, within the meaning of clause (b) (3) of section 423 (1) of the Code of Criminal Procedure. In my opinion, an order for detention in a Borstal School for any period permitted by the provisions of the Act can never amount to an enhancement of sentence. Section 25 (1) of the Prevention of Crime (Young Offenders) Act is in the following terms :

"In any trial against any person between 16 and 19 where a sentence of imprisonment would ordinarily be passed, the Court may, instead of passing such sentence, direct that such person shall be sent to a Borstal School for a period of not less than two years and not extending beyond the age of 21."

It is clear from the terms of this section that an order of detention in a Borstal School is not a sentence of imprisonment; in fact, it is something which is substituted for a sentence of imprisonment.

It is also plain, from the scheme of the Act and the rules which have been made thereunder, that the period of detention ordered under this section on a juvenile accused bears no relation whatever to the sentence of imprisonment which would be passed on an adult accused for a similar offence. In considering the proper period of detention in a Borstal School entirely different and, in fact, almost opposite considerations arise to those which arise in considering the sentence of imprisonment to be passed on an adult.

Section 10 of the Prevention of Crime (Young Offenders) Act is as follows :

“ The powers and duty conferred and imposed on Courts by this Part (*i.e.*, Part II of the Act in which section 25 also occurs) may be exercised and performed by any of the Courts hereunder mentioned, in original, appellate and revisional jurisdiction, in cases within their powers and jurisdictions as defined by other laws :—(*a*) the High Court, (*b*) Courts of Session, and so on.”

Consequently, it is clear that in its appellate jurisdiction a Court of Session can exercise the powers conferred by section 25 of the Prevention of Crime (Young Offenders) Act. Supposing that in this case the learned Sessions Judge had decided to uphold the conviction of the respondent, but to reduce his sentence to a sentence of one year's rigorous imprisonment, it would then have been open to him, instead of passing this reduced sentence of one year's rigorous imprisonment, to have ordered the detention of the respondent in a Borstal School for any period up to the time when he reaches the age of 23, the age which has been substituted for 21 in section 25 (*f*) by a notification of the Local Government issued under the proviso to this sub-section.

Therefore it is clear that, under section 10 of the Act, a Court of Session on appeal has jurisdiction to

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order detention in a Borstal School for any period which is legal under the provisions of sub-section (1) of section 25, irrespective of the length of the sentence of imprisonment which has been passed by the Magistrate from whose judgment the appeal is brought; and in ordering such detention there can be no question of an enhancement of sentence having been made.

In the present case, instead of the order directing that the respondent shall be sent to the Borstal School at Thayetmyo for a period of two years, I direct that he do be detained in the Borstal School for a period of four years, this period to be reckoned from the date of his conviction by the Magistrate.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

V.R.C.T.V.R. CHETTYAR

v.

C.A.P.C. CHETTYAR.*

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Hindu law—Relations of members inter se of Hindu joint family carrying on family business—Members not partners governed by Partnership Act—Partnership Act (IX of 1932), ss. 5, 12, 30, 31, 42—Rights and obligations of co-parceners not regulated by Partnership Act—Misuse of language—Personal law—Duty of members to assist in family business—Hindu joint family carrying on family business not a "firm"—Adjudication in insolvency of members of Hindu joint family as partners—Presidency-Towns Insolvency Act (III of 1909), s. 99.

The application of the term "partnership" to the relations *inter se* of the members of a Hindu joint family which owns and carries on a business involves a misuse of the term, and a misconception of the characteristics of such a family. There has never been any justification in law or common sense for holding that the members of a Hindu joint family who carry on business as such are partners governed by the Partnership Act. Section 5 of the Act merely restates the true legal position of the members of a Hindu joint family. The interest of the partners in a firm is determined by contract, the interest of the members of a Hindu joint family in ancestral business is acquired by status. An ancestral business devolves upon the members of a Hindu joint family as part of their inheritance, and their rights and obligations

* Civil Misc. Appeal No. 43 of 1935 from the order of this Court on the Original Side in Insolvency Case No. 249 of 1932.