

CRIMINAL REVISION.

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

KING-EMPEROR *v.* BO THIN.*

1937
Feb. 15.

Enhancement of sentence—Lenient sentence by Sessions Court—High Court's power in revision—Sentence of death—Benefit of the lenient sentence.

Where a Sessions Judge passes a more lenient sentence in contravention of the rulings of law which are laid down from time to time for the guidance of those dealing with criminal cases, the High Court will interfere and will enhance the sentence in a proper case.

In a murder case if the sentence of death is the only possible sentence which ought to have been passed but was not passed, the High Court would ordinarily enhance the sentence. It may however in the circumstances of the case allow the accused the benefit of the lenient sentence.

Emperor v. Mangal Narau, I.L.R. 49 Bom. 450; *In re Gunduthalayan*, I.L.R. 53 Mad. 585; *Nga Tun Min v. King-Emperor*, Cr. Ap. No. 1026 of 1934, High Court Rangoon, referred to.

Maung U v. The Queen-Empress, P.J. L.B. 112, overruled.

Lambert (Assistant Government Advocate) for the Crown.

Maung Maung for the accused.

ROBERTS, C.J.—This is an appeal by one Nga Bo Thin who was convicted by the Additional Sessions Judge of Pakòkku on the 11th November last of the murder of his sister Ma Tha E, and the appellant has been called upon to show cause why the sentence of transportation for life passed upon him should not be enhanced.

The facts are quite simple. The appellant went out in a cart to cut fuel with his sister and a friend in the same cart, and three more carts accompanied them.

* Criminal Revision No. 26A of 1937 and Criminal Appeal No. 4 of 1937 from the order of the Additional Sessions Judge of Pakòkku in Sessions Trial No. 24 of 1936.

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The appellant slept throughout the night, and an attempt was made when they arrived at their destination in the early hours of the morning to wake him. It is not quite certain what was said between the parties, but it appears abundantly clear that when Bo Thin was successfully waked the first thing he did was to strike a brutal and ferocious blow at his sister who fell into the arms of Ma Ngwe Yi and died shortly after. There was a large gaping wound in the neck and the spinal column was completely severed. Very great force must have been used to inflict this injury. There was no real suggestion of provocation although it was said that the appellant might have been angered at having been woken up.

But the point was seriously taken that he inflicted these injuries in a semi-conscious condition without any knowledge of what he was doing at all. It is clear that before the blow was struck Ma Tha E said to him "It is between an elder and a younger : otherwise I would like to kick you down." Such a remark must have been made in answer to something said by the appellant. There can be little doubt that he knew what he was doing at the time he struck this blow, although it is true that there was no premeditation and he must have inflicted it within a very few seconds of being awakened. He ran away into the jungle and was not apprehended till two days later.

The learned Additional Sessions Judge in passing sentence referred to the case of *Maung U v. The Queen-Empress* (1). I desire to say that the reasons given for refraining from passing the death sentence in that case can no longer be regarded as the law in Burma, and the case is of doubtful authority for most of the propositions contained in it. The Additional Sessions Judge ought,

in my opinion, to have passed the death sentence in this case, but that does not mean that the Court now will alter his decision. It is desirable to say quite clearly that where a Sessions Judge passes a more lenient sentence in contravention of the rulings of law which are laid down from time to time for the guidance of those dealing with criminal cases, this Court will interfere and will enhance the sentence. At the same time in this particular instance we think that we should not interfere. There was an absence of premeditation, not such, we think, as to make it wrong to pass the death sentence, but such as might well have weighed with other authorities in exercising clemency: three months have elapsed during which the appellant has believed that his life would be spared: the learned Assistant Government Advocate does not press upon us to enhance the sentence: and we are in agreement with the decisions in *Emperor v. Mangal Naran* (1) and *In re Gunduthalayan (a) Thalian* (2), and also with some observations of Baguley J., which were concurred in by Ba U J., in *Nga Tun Min v. King-Emperor* (3) in which he says:

"Legally I can see no justification for not imposing the death penalty. It does not, however, necessarily follow that this Court must enhance the sentence in revision. It is recognized that a person who has, even wrongly, got the benefit of a lenient sentence at his trial, may sometimes be allowed to benefit by his good fortune, provided the sentence passed is one which is legal."

That case seems to be somewhat similar to the case under review, and I am accordingly of opinion that whilst confirming the conviction for murder we should refuse to enhance the sentence but leave it unaltered.

LEACH, J.—I agree.

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(1) (1924) I.L.R. 49 Bom. 450. (2) (1929) I.L.R. 53 Mad. 585.
 (3) Cr. Ap. No. 1026 of 1934, H.C. Ran.