

CRIMINAL REVISION.

Before Mr. Justice Mackney.

MAUNG SHWE BA v. MA THEIN NYA.*

1938

Mar. 1.

Maintenance—Food and clothing—Education of the child—Change in the circumstances of the child—Criminal Procedure Code, ss. 488, 489.

In a civilized state a human child cannot be maintained simply by providing it with clothing and food. In the present state of society the mere maintenance of the body is not sufficient; provision has to be made for the child's developing mind and conscience. The term "maintenance" in s. 488 of the Code of Criminal Procedure must include the minimum amount of education for a child which the conventions of the country call for.

In re Bred's Will, 1 Ch. 226, referred to.

Nga Hla v. Mi Hla Kyu, (1907-09) 1 U.B.R. (Cr.) 17, dissented from.

Advance in age of a child is a change in the circumstances of the child within the meaning of s. 489 of the Code.

Charles Nefean v. Ma Kyaw, (1893-1900) P.J. L.B. 393, followed.

MACKNEY, J.—Man does not live by bread alone, nor is he like the animals. In a civilized state a human child cannot be maintained simply by providing it with clothing and food. The mere maintenance of the body is not sufficient; provision has to be made for the child's developing mind and conscience: and in my opinion, in our time, "maintenance" should be held to include this. Therefore, it seems to me that any calculation which fails to take these matters into account is bound to result in an inadequate sum being estimated for the maintenance of the child.

I am aware that in English Law the word "maintenance" is restricted to the provision of necessaries such as food, clothing and lodging, and such an interpretation of the word was in conformity no doubt with primitive ideas on the duties of parents and citizens. In our time, however, it is realized that in addition to the duty of providing such necessaries, a father has

* Criminal Revision No. 727B of 1937 from the order of the Headquarters Magistrate, Mergui, in Cr. Misc. Trial No. 43 of 1937.

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also to provide for some sort of training for his child to fit him to take a place in society. Sir William Blackstone in his commentaries on the Laws of England, Volume I, page 426, Fourth Edition, says :

“The last duty of parents to their children is that of giving them an *education* suitable to their station in life ; a duty pointed out by reason, and of far the greatest importance of any. For, as Puffendorf very well observes, it is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child by bringing him into the world, if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself. Yet the municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children.”

The learned commentator then points out that—

“the legislature has put education within the reach of all by the statute 33 & 34 Vict. c. 75 under which parents may now be compelled to cause their children, between the ages of five and thirteen to attend the schools provided by the School-boards constituted under that act, unless they are already being properly educated at some other efficient school.”

Thus it would seem that the law of England has provided for the education of children otherwise than by extending the meaning of the word “ maintenance ” : a course which it would be most confusing to take in view of the manner in which the English law develops. The same considerations do not apply to the codified law of Burma. In the Code of Criminal Procedure there is no definition of the word “ maintenance ”, and it seems to me that the Courts should interpret the word in conformity with the reasonable requirements of the public conscience. It does not appear to me to involve straining the meaning of the word to say that it means, not only the maintenance of the body but also of the mind.

The contrary view has been taken in *Nga Hla v. Mi Hla Kyu* (1). The learned Judicial Commissioner, however supports his conclusion mainly by relying on the use of the word in the English law. I have referred to the case in *In re Breed's Will* (2), which the learned Judicial Commissioner quoted but had not the opportunity of reading. It was there held that the expenses of education of children are included in their maintenance and support : section 26 of Lord Cranworth's Act (23 & 24 Vict. c. 145) applied in that particular case. The part of the section in which the word " maintenance " occurs is as follows :

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" In all cases where any property is held by trustees in trust for an infant, either absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education."

The legislature seems to have realized that not only maintenance in the older meaning of the word but also education were fittingly to be provided for children, and that education was in fact merely an additional form of maintenance which the present conscience of society considers should be given to the children.

I have also examined the article on " maintenance " in Stroud's Judicial Dictionary, to which the learned Judicial Commissioner refers and I think it is clear from the Acts referred to therein that education is considered as an extended form of maintenance, for the two words seem to be constantly coupled, as if mutually

(1) (1907-09) 1 U.B.R. (Cr.) 17.

(2) 1 Ch. 226.

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explanatory, and not denoting two entirely distinct ideas but together expressing one idea—the modern idea of “maintenance.”

I do not think we are bound to adopt (according to modern thought) the restricted meaning of “maintenance” found in English law; and I see no possible objection to including in the meaning of “maintenance”, as used in section 488 of the Code of Criminal Procedure, the education of children, that is to say, the minimum amount of education which the conventions of the country call for.

The applicant Maung Shwe Ba is obviously in a position to maintain his child adequately. The very fact that such a maximum as Rs. 100 has been fixed under the Code for the sum which a father may be compelled to contribute monthly to the maintenance of his child shows that it is intended that the general circumstances of the child and its parents should be taken into consideration to some extent.

It is true that the circumstances of the applicant have not, apparently, changed since the original order for maintenance was passed, but I cannot agree with the learned Sessions Judge that the advance in age of the child is not a change of the child's circumstances. It most clearly is: see *Charles Nepean v. Ma Kyaw* (1). A child of seven would, in my opinion, cost almost twice as much to maintain as a child of four, speaking of a child in the position of the child in question. It is true that the sum of Rs. 5 was thought sufficient, three years ago, both for the child of 4 and a child of 1, and that the child of 1 having died, the child of 4 has, with the positive acquiescence of the applicant, been receiving the whole of the allowance of Rs. 5. However, out of this original amount of Rs. 5, the child

(1) (1893-1900) P.J.L.B. 393.

of 1 can scarcely have used any very appreciable amount. It must have been intended almost entirely for the elder child.

I consider that a monthly allowance of Rs. 7 is the minimum that in the present circumstances should be awarded. I agree that the amount of Rs. 12 is excessive because it is based on a calculation of the fees required to send the child to an Anglo-Vernacular school. So long as some minimum schooling is provided for the child, I do not think that its guardian can claim more under the summary procedure of the Criminal Procedure Code. If it is thought that Maung Shwe Ba should be compelled to provide for the education of his child in an Anglo-Vernacular school, the guardian might have recourse to a civil suit.

The order of the Headquarters Magistrate is altered and the allowance of Rs. 12 which he has directed to be paid shall be reduced to one of Rs. 7 per mensem : the order as to costs is set aside, as there is no power to award costs under section 489 of the Code, but only under section 488.

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