

## CRIMINAL REFERENCE.

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

1939

May 16.

## THE KING v. KYAW AYE.\*

*Prevention of Crime (Young Offenders) Act, s. 25—Offence of theft by juvenile offender—Magistrate's choice—Imprisonment or whipping—Detention in Borstal—Magistrate's order of detention in Borstal—Sessions Judge's order of whipping in lieu of detention—Order an enhancement of sentence—Whipping Act, s. 3—Criminal Procedure Code, s. 423 (1) (b) (3).*

For an offence of theft, under s. 380 of the Penal Code, the Magistrate has the choice of sending the juvenile offender to prison, or, in lieu thereof, he may either cause him to be whipped or send him to the Borstal Institute. Where the Magistrate has decided to send the offender to Borstal, the Sessions Judge has no power to convert the order of detention into a sentence of whipping. The power to order a person to be whipped is only in lieu of another punishment under the Penal Code, and the Sessions Judge's order amounts to an enhancement of sentence which is illegal.

*King-Emperor v. Ah Hwee*, I.L.R. 14 Ran. 119; *King-Emperor v. Ismail*, I.L.R. 14 Ran. 625; *Tha E v. King-Emperor*, I.L.R. 14 Ran. 143, referred to.

*Myint Thein* (Government Advocate) for the Crown.

An order of reference for the decision of a Bench was made as follows by

BA U, J.—Respondent Kyaw Aye, aged 18, was tried and convicted on a charge of cattle-theft under Section 380, Penal Code, and ordered to be detained in the Borstal School for 4 years. On appeal the learned Sessions Judge of Bassein confirmed the conviction but set aside the order of detention and in lieu thereof gave him 20 lashes.

The question is whether the sentence of whipping given in lieu of the order of detention in a Borstal School amounts to enhancement within the meaning of section 423 (1) (b) (3), Code of Criminal Procedure.

The learned Government Advocate submits that it does. His contention is that though whipping can be given under section 3 of the Whipping Act in addition to or in lieu of any punishment to

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\* Criminal Reference No. 34 of 1939 arising out of Criminal Revision No. 125A of 1939 of this Court.

which an offender is liable, it cannot be given in lieu of an order of detention in a Borstal school as the order of detention is not a punishment.

An order of detention passed under section 25 of the Prevention of Crime (Young Offenders) Act according to the learned Government Advocate has the same legal effect as an order passed under section 562 of the Code of Criminal Procedure.

He contends that punishment as used in section 3 of the Whipping Act means the kind of punishment as set out in Section 53 of the Penal Code. There are six kinds of punishment as set out in that section, namely,

- (1) death
- (2) transportation
- (3) penal servitude
- (4) imprisonment, rigorous or simple
- (5) forfeiture of property
- (6) fine.

If the order passed under section 25 of the Prevention of Crime (Young Offenders) Act has the same legal effect as an order passed under section 562 of the Code of Criminal Procedure, it cannot then be punishment in lieu of which whipping can be given. In my opinion it does not have the same legal effect as an order passed under section 562 of the Code of Criminal Procedure.

The object underlying the infliction of punishment is to make the offender suffer either in person or in purse or in both so that he may not follow his errant way in future and at the same time to make others understand that they will be dealt with similarly if they commit any offence against society. This being recognized not to meet the case of a person having the first lapse in his life from the path of rectitude, section 562 was introduced. Under the said section a person who has his first lapse in life need not be sentenced to punishment. Provided certain conditions set out in that section are fulfilled, he may be given a chance of reforming himself by being let off on recognizances for a certain period of time. If he does not behave himself well within that period, he can be recalled and sentenced to any kind of punishment as prescribed in section 53 of the Penal Code. The order thus passed under section 562 is what I may call an order putting a man on probation of good conduct for a certain period of time. It does not affect him either in person or in purse; but the order passed under section 25 of the Prevention of Crime (Young Offenders) Act

1939

THE KING  
 •D.  
 KYAW AYE.  
 BA U, J.

1939  
 THE KING  
 v.  
 KYAW AYE,  
 BA U, J.

affects the offender directly in his person. Though he is not sent to jail, he is detained according to his age either in a Borstal school or a training school. It thus deprives him of his liberty. To be deprived of one's liberty is in effect a punishment. Detention in a Borstal or training school lies midway between rigorous and simple imprisonment. A man sent to rigorous imprisonment has to do hard manual labour ; whereas a man sent to simple imprisonment is allowed to pass his time in idleness. In the case of a boy sent to a Borstal or training school he is neither asked to do hard manual labour nor allowed to pass his time in idleness. He is taught some useful trade so that he may become a useful citizen on his release. Such being the case, I am of opinion an order passed under section 25 of the Prevention of Crime (Young Offenders) Act is a punishment within the meaning of section 3 of the Whipping Act. That this is so is in my opinion proved by what section 10 of the aforesaid Act says. Under the said section whipping can be given in lieu of the order of detention in the case of a boy under 16 years of age. Further, I may point out that the learned authors of the Law of Crimes, Ratanlal and Thakore, are also of opinion that detention in a reformatory is a punishment within the meaning of section 53 of the Penal Code. They say "To the six kinds of punishment mentioned in the section two more are added by subsequent enactments, namely whipping and detention in reformatories." (See page 85 of their book, 14th Edition.)

As this is, however, an important point, I refer the following questions for decision by a Bench, full or otherwise as the learned Chief Justice may decide :

- (1) Whether whipping can be given in lieu of an order of detention in a Borstal School ?
- (2) If so, how many stripes should be regarded as equivalent to a particular period of detention ?

I may note that the sentence of whipping in this case has been carried out.

ROBERTS, C.J.—In this case two questions have been referred for our decision. The first is whether whipping can be given in lieu of an order of detention in a Borstal School, and the second, if so, how many stripes should be regarded as equivalent to a particular period of detention.

The facts out of which this question arises are concerned with a matter in which the respondent and another were tried for an offence under section 380 of the Penal Code and the Fourth Additional Magistrate of Bassein passed an order against the respondent of four years' detention in the Borstal Institute. The learned Sessions Judge thought that this was unsuitable and substituted for it a sentence of twenty lashes of whipping which, we regret to learn, has been carried out.

Now, under section 3 of the Whipping Act, whoever commits, among other offences, an offence against section 380 of the Penal Code may be punished with whipping in lieu of any punishment to which he may, for such offence, be liable under the said Code : that is to say, the Magistrate who tried the case might have decided to order whipping in the case of this respondent ; but what, in fact, he decided to do was to send him to be detained in the Borstal Institute. How, then, did the learned Sessions Judge pass a sentence of whipping ? He could only do so by invoking section 3 of the Whipping Act and he could only pass a sentence of whipping in lieu of any punishment to which the respondent might be liable under the said Code, that is to say, he could only pass a sentence of whipping in lieu of a sentence of imprisonment ; but the respondent had never been sentenced to imprisonment and in order to give the learned Sessions Judge power to sentence him to whipping he must notionally reconvert the order sending him to the Borstal Institute into a sentence of imprisonment. He has no power to do so as that would be enhancing the sentence. It is clear that a Magistrate, in such case, has two alternatives before him. He may send an offender to prison or, in lieu thereof, he may either cause him to be whipped or send him to Borstal but the power to order a person to be whipped is only

1939

THE KING  
v.  
KYAW AYE.

ROBERTS,  
C.J.

1939  
 THE KING  
 v.  
 KYAW AYE.  
 ROBERTS,  
 C.J.

in lieu of another punishment under the Code and once an order of detention in Borstal has been passed there is no power to alter this order to a sentence of whipping.

The authorities which bear upon the point are numerous and clear. In *King-Emperor v. Ah Htwe* (1) it was pointed out that an order for detention in the Borstal Institute in substitution of a sentence of imprisonment is not enhancement, that is to say, it is a lesser sentence than that of imprisonment. It follows that a sentence of imprisonment must always be an enhancement of an order for detention in a Borstal Institute. This authority was followed in *Tha E v. King-Emperor* (2). The latter decision was referred to by a Full Bench in *King-Emperor v. Ismail* (3).

In the circumstances the sentence which has been carried out was an illegal one.

As it has been carried out the records will be sent back to the learned Sessions Judge for future guidance in matters of this kind.

DUNKLEY, J.—I agree.

(1) (1936) I.L.R. 14 Ran. 119.

(2) (1936) I.L.R. 14 Ran. 143.

(3) (1936) I.L.R. 14 Ran. 625.