CRIMINAL REVISION.

Before Mr. Justice Spargo.

1939

Jan. 17.

CHINNAYAR

v.

MAUNG MYA THI AND OTHERS.*

Judgment—Criminal case—Judgment dated and signed by trial magistrate—Reading out of judgment in Court by succeeding magistrate as dated and signed by trial magistrate—Judgment not in accordance with law—Irregularity not curable—Criminal Procedure Code, ss. 350, 537.

Where a magistrate who has heard the case has dated and signed the judgment but before delivery he has handed over charge of his office to his successor who reads it out on a subsequent date in open Court, the judgment is not in accordance with law and the defect of procedure is such that it cannot be cured by s. 537 of the Criminal Procedure Code. It is not contemplated in the Code that a magistrate shall deliver any judgment other than his own and if he does so it amounts to delivering no judgment at all.

Emperor v. *Ram Sukh*, I.L.R. 47 All. 284; *Mohamed Hayet* v. *King-Emperor*, I.L.R. 7 Ran. 370; *Tilak* v. *Baisagomoff*, I.L.R. 23 Cal. 502, distinguished.

In re Savarimuthu Pillai, I.L.R. 40 Mad. 108, referred to.

P. K. Basu for the applicant.

Khin Maung Gyi for the respondents.

Tun Byu (Government Advocate) for the Crown.

SPARGO, J.—In Criminal Regular Trial No. 164 of 1938 the learned Township Magistrate of Ingabu, who at the time of the recording of the evidence was U Ba Aung, had, on the 21st September 1938, fixed the 27th September for judgment. In the interval he was placed under suspension and at some moment of time during that interval, which it is not possible for me to determine, he ceased to exercise jurisdiction in that Court. He had to hand over charge to another Magistrate named U E Maung.

* Criminal Revision No. 619B of 1938 from the order of the Sessions Judge of Henzada in Cr. Appeal No. 281 of 1938.

Under date 24th September 1938 there is a note in the diary :

" In this case, judgment is already written. I will keep in my almirah."

Under date 27th September 1938 there appears this diary entry :

" Called. All three accused persons present. U Kyaw Shein and U Ant appeared. Judgment delivered. * * * ."

The judgment which is filed in the proceedings bears the signature of U Ba Aung and not that of U E Maung and is dated 24th September 1938 and not 27th September 1938.

How it came about that this judgment, which had evidently been written by U Ba Aung, or typed at his dictation, was signed and dated by him 24th September I do not know. It is possible that it was an attempt by him to dispose of the case by an informal delivery of judgment before he had to hand over charge. This, however, is mere conjecture and I am bound to admit that I cannot do more than guess at the circumstances.

The question that has arisen here is, does this merely constitute an irregularity in the judgment or does it constitute something more than an irregularity ? If it is a mere irregularity section 537 of the Criminal Procedure Code says that unless the irregularity has occasioned some failure of justice, the finding, sentence or order shall not be reversed on account of the irregularity.

In the decision of this question it is necessary also to refer to section 350 of the Criminal Procedure Code which deals with the case where a Magistrate is succeeded by another Magistrate after he has recorded the whole or any part of the evidence in a trial. It lays down that the Magistrate so succeeding may act on the

1939

CHINNAYAR v. MAUNG MYA THI.

SPARGO, J.

evidence recorded by his predecessor. There is a proviso to the effect that the accused may when the second Magistrate commences his proceedings demand that the witnesses or any of them be re-summoned and re-heard.

Section 367 (1) of the Criminal Procedure Code provides the procedure for delivery of judgment.

Mr. P. K. Basu for the applicant admitted that there was an irregularity in respect of the delivery of judgment and cited a number of cases to show that the finding and sentence should be allowed to stand because the irregularity was cured by section 537.

Mohamed Hayet Mulla v. *King-Emperor* (1) does not seem to me to help in the decision of the present case because in that case the Magistrate concerned clearly purported to be pronouncing his own judgment and not one written by somebody else as in this case.

Emperor v. *Ram Sukh and others* (2) was a case where the Magistrate delivered his own judgment but forgot to sign and date it.

Tilak Chandra Sarkar and others v. *Baisagomoff* (3) was a case where the Magistrate pronounced sentence before he wrote his judgment. The judgment was written on the evening of the same day. In this case it was held that this was a mere irregularity.

The case which appears to me to come closest to the facts of the present case is *Re Savarimuthu Pillai and two others* (4). In this case it was decided *obiter* that in the absence of a demand for a new trial it would be in the discretion of the successor to date, sign and pronounce his predecessor's judgment.

As to this decision it is to be noted that the point had not been raised for decision in that case and therefore it is *obiter* ; and if the meaning intended is that the

(1) (1929) I.L.R. 7 Ran. 370.
(2) (1925) I.L.R. 47 All. 284.
(3) (1896) I.L.R. 23 Cal. 502.
(4) (1916) I.L.R. 40 Mad. 108.

new Magistrate can take the judgment written by his predecessor and deliver it as the judgment of his predecessor, that is to say without adopting it as his own judgment, then I venture very respectfully to disagree.

In my opinion the only way in which such a Judgment could be delivered by the second Magistrate would be in virtue of section 350 of the Criminal Procedure Code. It would otherwise have to satisfy the test, namely, was the succeeding Magistrate in so acting acting on the evidence recorded by his predecessor. It is quite possible that he may take the judgment left by his predecessor and compare it with the evidence recorded in the case and discover that it expresses what he himself would have decided on the case. In that case I see no reason why if there is no demand for a new trial on the part of the accused he should not deliver that judgment as his own. In fact by so doing it becomes his own judgment.

If I thought that that had happened here I should be prepared to say that the defect in this case amounted only to an irregularity which could be cured by section 537. But I see no reason to suppose that that was what happened. Everything seems to point to the conclusion that U E Maung when he delivered judgment on the 27th September delivered it not as his own judgment but as that of his predecessor. He did not sign it himself nor did he date it; there is nothing to show that he even read it though probably he pronounced the sentence.

Nowhere is there any note in the diary or elsewhere showing that on the 27th September U E Maung purported to be deciding the case in virtue of section 350 of the Code on the evidence recorded by his predecessor. Nowhere does it appear that the accused were asked whether they had any objection to

1939

CHINNAYAR v. MAUNG MYA THI.

SPARGO, J.

his so acting. Probably this does not matter a great deal because a duty is cast upon the accused to demand a new trial, if they desire it, and not upon the Magistrate to offer it. But the point is of interest because I think that if U E Maung had purported to act under section 350 he would certainly have told the accused that they were entitled to a new trial. This is routine practice.

I am therefore of opinion that the defect in the delivery of this judgment went beyond a mere irregularity curable under section 537. It is not contemplated in the Code that a Magistrate shall deliver any judgment other than his own and if he does so it is not an irregularity in the form of delivery ; it is not delivering judgment at all.

This application for revision is therefore dismissed.