

## CRIMINAL REVISION.

*Before Mr. Justice Sharpe.*THE KING *v.* MAUNG THEIN AUNG.\*

1940

Mar. 1.

*First offender—Power to release after due admonition—Power exercisable by all classes of magistrates—Criminal Procedure Code, s. 562 (1A), proviso to s. 562 (1).*

The power conferred by s. 562 (1A) of the Criminal Procedure Code of releasing a first offender after due admonition in the class of cases mentioned therein is exercisable by all magistrates of whatever class they may be. Normally a proviso governs what goes before it and does not affect what follows after it. The proviso to sub-section (1) does not apply to sub-section (1A) of s. 562 of the Code.

*Murlidhar v. Mahbub Khan*, I.L.R. 47 All. 353, referred to.

*Emperor v. Ranchhod*, 27 Bom. L.R. 1019, dissented from.

SHARPE, J.—This case raises a short and interesting point which, so far as I am aware, has not yet been decided by this High Court, while the Bombay and Allahabad High Courts have taken opposite views on the question.

The facts are these. The respondent was charged before a Magistrate of the second class, who was not specially empowered by the Governor under section 562 of the Code of Criminal Procedure, with criminal trespass, an offence punishable under section 447 of the Penal Code with imprisonment not exceeding three months. The respondent was convicted. No previous conviction was proved against him. The Magistrate who convicted him was of opinion that, having regard to the age, character and antecedents of the respondent and to the trivial nature of the offence and to the circumstances under which it was committed, it was a case in which the respondent might properly be released after due admonition, under the provisions of

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\* Criminal Revision No. 110B of 1940 from the order of the 5th Additional Magistrate of Pegu in Criminal Regular Trial No. 149 of 1933.

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sub-section (1A) of section 562 of the Code of Criminal Procedure, instead of being sentenced to any punishment.

In the course of his judgment the Magistrate discussed the question whether the proviso which follows sub-section (1) of section 562 governs the whole section or only that particular sub-section, and considered the conflicting decisions of the Bombay and Allahabad High Courts: the former has held that the proviso also applies to sub-section (1A), while the latter has taken the opposite view. The Magistrate decided to follow the decision of the Allahabad High Court and released the respondent after due admonition.

The Additional District Magistrate, being of the contrary opinion, has now submitted the proceedings to this Court with a recommendation to set aside the order of the trial Court and to pass a sentence in lieu thereof under sub-section (3) of section 562.

In *Murlidhar v. Mahbub Khan* (1), which is the Allahabad case mentioned above, Mears C.J. and Piggott J. expressed the opinion (at page 354), after examining the whole of section 562, that the proviso to sub-section (1) must be read as a part of the said sub-section, and that it is superseded as regards the effect of sub-section (1A) by the words "the Court before whom he is so convicted" in sub-section (1A) and cannot be used so as to control those words. The Bombay case, *Emperor v. Ranchhod Harjivan* (2), was decided in the following year (1925), but the Allahabad decision does not appear to have been referred to in the Bombay case, the report of which, although the case was decided by a Bench of two Judges, gives no indication of the view taken by the second member of the

(1) (1924) I.L.R. 47 All. 353.

(2) 27 Bom. L.R. 1019.

Court. In the course of his judgment Macleod C.J. is, at pages 1020/1, reported to have said :

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“ It is unfortunate that, when sub-section (1A) was added to section 562, the Legislature did not place it before the proviso. Ordinarily speaking, when a proviso governs the whole of the provisions of a section, it ought to appear at the end . . . . Before sub-section (1A) was added, the only power conferred on the Court by the section was to direct that the accused, if a first offender, in cases coming within the section, should be released on his entering into a bond . . . . A further power is added by sub-section (1A) to release the accused in cases coming within the sub-section after due admonition, if he is a first offender. That undoubtedly is a power under the section, and, although the proviso comes now in the middle of the section, that does not affect the competency of the Third Class Magistrate to exercise the power granted to the Court under sub-section (1A).”

With all respect to Sir Norman Macleod, I am unable to follow the argument that, because the newly-added power to release after due admonition is a power under section 562, the proviso to sub-section (1) does not affect the competency of the Third Class Magistrate to act under sub-section (1A). It seems to me not impossible that the Bombay Law Reporter inaccurately reproduces the language of the learned Chief Justice.

In *Emperor v. Danlat Singh* (1) the Judicial Commissioner, Nagpur, expressed a preference for the Bombay decision, *supra*, over the Allahabad decision, but such expression of opinion did not form the basis of his decision in the case before him.

I do not think that one should say, as Macleod C.J. did, that the insertion of the new sub-section (1A) after, rather than before, the original proviso, was an unfortunate accident. One must take it that it was deliberately inserted where it was. To my mind there may have been a very good reason for not making the

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(1) 30 Cr. L.J. 226.

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original proviso applicable to the new sub-section : while the Legislature may well have refrained, as it did, from allowing Magistrates of the third class, and also all Magistrates of the second class except a chosen few, to have power to direct a convicted person to enter into a bond for his good behaviour for three years, it may well have considered, as I think it must be taken to have done, that it was not likely to go far wrong in entrusting to all Magistrates, even to those of the third class, the power to release first offenders after due admonition in trivial cases. I think that it may well be that the Legislature purposely placed the new sub-section (1A) where it did, so that all Magistrates, of whatever class they might be, could exercise this new power.

I do not overlook the fact that, when sub-section (1A) was added, the occasion was not taken to substitute in the middle of the proviso to sub-section (1) the word "sub-section" for the word "section", and to substitute in section 380 the words "sub-section (1) of section 562" for the words "section 562" ; and, further, that a similar amendment was not made in Schedule IV, that is to say, in power (9) of the powers with which a Magistrate of the second class may be invested by the Governor. But in my judgment these omissions are insufficient to counter-balance, and cannot out-weigh, the fact that the new sub-section (1A) was inserted after, and not before, the original proviso. If the retention of the word "section" in the middle of the proviso was deliberate, then the retention of a colon at the end of sub-section (1), immediately before the proviso, was equally deliberate. I propose to rest my decision on this : that I am quite unable to see any good reason for not following the normal rule of construction in the case of a proviso, which is, that the proviso governs what goes before it and does not affect what follows after it. To my mind the Code of Criminal Procedure

(Second Amendment) Act, 1923, was badly drafted, but I cannot, for that reason, depart from the usual rule for construing provisoes.

In the result, I think that the Magistrate, who released the present respondent after due admonition, had power so to do, notwithstanding the fact that he was a Magistrate of the second class not specially empowered by the Governor. It is not suggested that that was not a suitable course to follow in the present case. There is, accordingly, no ground for interference in revision. Let the record be returned with these observations and with an intimation that the Additional District Magistrate's recommendation is not accepted.

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