

CRIMINAL REVISION.

*Before Mr. Justice Mosely.*MAUNG HTWE *v.* BA THANT AND ANOTHER.*1939
Oct. 17.

Arrest—Judgment-debtor arrested and later released by Court—Execution of process—Failure of process server to make endorsement of execution on warrant—Return of warrant by bailiff for endorsement of execution—Bailiff's power to delegate authority to arrest—Re-arrest by process server of judgment-debtor, illegal—Civil Procedure Code, O. 21, rr. 24, 25.

Where a judgment-debtor has been arrested and brought before the Court the process has been executed, that is to say, the arrest has been carried out, though it may not have been carried out in accordance with law.

The bailiff has power to delegate the execution of a warrant to a process-server, but where he returns the warrant to the process-server for endorsement of the execution that has already been effected, *viz.*, the arrest and the release by the Court of the judgment-debtor, the process-server has no authority to re-arrest the debtor on such warrant and his action is illegal

B. C. Paul for the applicant.

E Maung for the respondents.

MOSELY, J.—This is an application in revision against the discharge of Maung Ba Thant, a process-server, and Maung Khe Yu, a decree-holder, who were charged by the applicant Maung Htwe, a judgment-debtor, under section 342 and section 342 read with section 114 of the Penal Code, with causing wrongful confinement to Maung Htwe.

A warrant for Maung Htwe's arrest was issued at the instance of Maung Khe Yu and the bailiff endorsed it for service to the process-server Maung Ba Thant. Maung Htwe was arrested but was released by the Additional Township Judge under section 135 of the Civil Procedure Code on the ground that he was on his way back from attending Court at the time.

As a matter of fact it appears that that was mistaken in that Maung Htwe, though he had attended Court,

* Criminal Revision No. 381B of 1939 from the order of the Sessions Judge of Myaungmya in Criminal Revision No. 135 of 1939.

1939

MAUNG
HTWE
v.
BA THANT.
SELY, J.

was not returning from Court to his home but was going in another direction : *vide Ardeshirji v. Kalyan Das* (1).

The process-server had returned the warrant the same day to the bailiff without any endorsement on it, and the Bailiff Maung Nyein (p.w. 3) in evidence said that he merely returned the warrant to the process-server for want of his report, as he had made no report of execution. As the warrant was returnable on a date 19 days afterwards the bailiff presumably was under the impression that it had been executed, (though the bailiff speaks to the contrary effect), when the process-server returned the warrant to him.

On this the process-server, instead of endorsing execution on the warrant, re-arrested Maung Htwe next day.

The trying magistrate discharged the accused on the ground that there was no rule against executing the warrant twice while it was still in force. The learned Sessions Judge, to whom also an application was made for revision, agreed with this and said that the first arrest had only been an abortive one, and that as the warrant had not been endorsed by the process-server or the bailiff it was still current until the date on which it had to be returned.

This is a possible view no doubt, but I do not think it is the proper view. There is, curiously enough, no authority on the subject. Order 21, rule 24, says that the process shall be delivered to the proper officer to be executed, and rule 25 says that the officer entrusted with the execution of the process shall endorse on it the day on and the manner in which it was executed, or, if not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

(1) (1909) I.L.R. 32 All. 3.

It appears to me that when the judgment-debtor was arrested and brought before the Court the process had been executed, that is to say, the arrest had been carried out, though it may not have been carried out in accordance with law.

Be that as it may, there is another reason why the second arrest was unlawful. The bailiff had power to delegate the execution of the warrant to the process-server, *vide Dharam Chand Lal v. Queen-Empress* (1) and *Sheo Progash Tewari v. Bhoop Narain Prosad Pathak* (2), and did so in the first instance. But on the second occasion the bailiff did not delegate his authority to arrest to the process-server, but merely returned the warrant to him for endorsement. As I have said, in the circumstances of the case the endorsement for which the process was returned must have been the endorsement of execution, and could not be at that date endorsement of non-execution, though the bailiff tried to make that out. In any case it was only returned for endorsement and not for further execution.

In these circumstances the re-arrest was unlawful. I do not propose, however, in revision to order a retrial. The offence was not a serious one, for it does not appear that the process-server was actuated by malice. It is possible that he made a genuine mistake of fact (section 79, P.C.) and thought that the process was being returned to him for re-execution.

This application in revision will therefore be dismissed.

1939
 MAUNG
 HTWE
 v.
 BA THANT.
 MOSELY, J.

(1) (1895) I.L.R. 22 Cal. 596.

(2) (1895) I.L.R. 22 Cal. 759.