

CRIMINAL REVISION.

*Before Mr. Justice Mya Bu.*THE KING *v.* PO HTWA AND ANOTHER.*

1939

Nov. 28.

Summary trial—Sentence of imprisonment in default of fine—Maximum substantive sentence of imprisonment—Aggregate of terms of imprisonment exceeding term of substantive sentence—Criminal Procedure Code, ss. 32, 53, 262 (2).

Where a magistrate has power to pass a sentence of imprisonment as well as of fine the limit placed on the term of the substantive sentence of imprisonment does not affect his power of passing a sentence of imprisonment in default of payment of fine. Under s. 262 (2) of the Criminal Procedure Code a magistrate can impose a sentence of imprisonment in default of payment of fine in addition to the maximum sentence of three months' imprisonment which he has imposed for the offence.

Empress v. Asghar Ali, 1 L.R. 6 All. 61, referred to.

MYA BU, J.—The respondent Po Htwa was convicted under section 21 (a), Fisheries Act, and sentenced to suffer three months' rigorous imprisonment and also to pay a fine of Rs. 50 or in default to suffer further two weeks' rigorous imprisonment by the First Class Subdivisional Magistrate, Pegu. The case was tried summarily under the provisions of section 260 of the Code of Criminal Procedure. As Po Htwa could not pay the fine the question for consideration is whether, in view of section 262 (2) of the Code of Criminal Procedure, the term of rigorous imprisonment in default of payment of fine in addition to the three months' rigorous imprisonment, which is the maximum term of imprisonment sanctioned by that section, is legal or not.

Section 262 (2) is in these words :

“No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this chapter.” (Chapter XXII.)

* Criminal Revision Nos. 483B/484B of 1939 from the order of the Sub-divisional Magistrate of Pegu in Cr. Summary Trial Nos. 57/58. of 1939.

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The punishment prescribed for a first offence under section 21 (a) of the Fisheries Act is "imprisonment for a term which may extend to three months, or with fine which may extend to Rs. 200, or with both." When this section and section 64 of the Penal Code, as well as sections 32 and 33 of the Code of Criminal Procedure are read together there can be no doubt of the Magistrate's power to pass the sentence which he passed in this case. If the case had been regularly tried the question of the legality of the sentence would not arise. So, the question for consideration in this case resolves itself into whether the limit imposed by section 262 (2) of the Code of Criminal Procedure applies to the substantive sentence of imprisonment only or applies to a combined period of substantive sentence of imprisonment and sentence of imprisonment in default of payment of fine. There is paucity of direct authority on this point but it was held in a case where an accused had been convicted and sentenced to pay a fine of Rs. 60 or in default to suffer four months' imprisonment in the civil jail that the rule of section 262 of the Criminal Procedure Code applied to substantive sentences of imprisonment. [*Empress v. Asghar Ali* (1).] On a reference to section 33 it will be seen that a Magistrate may award such term of imprisonment in default of payment of fine subject to certain provisos which are irrelevant to the question under consideration and the imprisonment awarded in default of payment of fine may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 32 which limits the term of substantive sentence of imprisonment to two years only. It is therefore deducible from the provisions of sections 32 and 33 that where a Magistrate has power to pass a sentence of imprisonment as well as of fine the

limit placed on the term of the substantive sentence of imprisonment does not affect his power of passing a sentence of imprisonment in default of payment of fine.

For these reasons I am of the opinion that section 262 (2) of the Criminal Procedure Code does not render illegal a sentence of imprisonment in default of payment of fine if otherwise legal, merely by reason of the fact that the aggregate of the terms of substantive sentence of imprisonment and of the sentence of imprisonment in default of payment of fine exceeds three months or by reason of the Magistrate having passed a substantive sentence of imprisonment for the maximum term allowed by that section. In my judgment the limit placed by section 262 (2) of the Criminal Procedure Code applies only to a substantive sentence of imprisonment.

In the result I decline to interfere with the order of the Subdivisional Magistrate.

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