

CRIMINAL REFERENCE.

Before Mr. Justice Jardine and Mr. Justice Parsons.

QUEEN-EMPRESS v. DA'GADU.*

1891.

August 6.

Whipping Act (VI of 1864), Sec. 2—Whipping—Whipping in lieu of fine or other punishment under the Indian Penal Code (Act XL of 1860).

When an accused person is sentenced to whipping under section 2 of the Whipping Act (VI of 1864), the punishment of fine or imprisonment or both cannot be legally inflicted under the Indian Penal Code in addition to the whipping.

The word "punishment" in section 2 of the Act means the total of punishments awardable under the Indian Penal Code.

THIS was a reference under section 438 of the Code of Criminal Procedure (Act X of 1882) by S. Hammick, Sessions Judge of Ahmednagar, in the case of Dagadu valad Hajarimal.

The accused was convicted of theft by the Magistrate (First Class) at Nagar, and sentenced to receive fifteen stripes under section 2 of the Whipping Act, and to pay a fine of Rs. 10 under section 379 of the Indian Penal Code.

The Sessions Judge, being of opinion that a fine could not be inflicted in addition to whipping under section 2 of the Whipping Act (VI of 1864), referred the case for the orders of the High Court with the following observations:—

"Section 2 of the Whipping Act provides that whoever commits certain offences (one of which is theft) may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the Indian Penal Code.

"The Magistrate appears to think that when the Indian Penal Code authorizes the infliction of two punishments, *viz.*, imprisonment and fine, it is lawful under section 2 of the Whipping Act to substitute a whipping for the imprisonment and to inflict the fine as well.

"If this is his opinion, I am inclined to think that it is erroneous. I interpret section 2 of the Whipping Act as meaning that if a whipping is inflicted, no other punishment as prescribed by the Penal Code is allowable. If this is the right

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view, then the sentence to pay a fine of Rs. 10 in this case is illegal and must be cancelled.”

There was no appearance for the Crown or for the accused.

The following judgment of the Court (Jardine and Parsons, JJ.) was delivered by

JARDINE, J.:—The Sessions Judge has referred this case being of opinion that on a true construction of section 2 of the Whipping Act, VI of 1864, the sentence, on conviction under section 379 of the Indian Penal Code, to fifteen stripes and fine of Rs. 10 was illegal. He is of opinion that if a whipping is inflicted, no other punishment as prescribed by the Penal Code is allowable: and that, as the whipping has been inflicted, the fine should be annulled.

The point does not appear to have been decided in any reported case. It would appear, however, that in section 2 of the Whipping Act, which contains no mention of section 53 of the Penal Code, the word “punishment” is used in a somewhat different sense to the word “punishments” in the preceding section, and may be interpreted to mean the total of punishments awardable, *i.e.*, in the case under section 379, imprisonment and fine. This construction seems supported by the opinion of the Judges in *Reg. v. Genu*⁽¹⁾ and that of Peacock, C. J., in *Nassir v. Chander*⁽²⁾ where he construes section 2 as meaning that in lieu of giving the thief the punishment provided by the Penal Code, *viz.*, three years’ imprisonment and fine, he may be punished with whipping. For these reasons we set aside the part of the sentence imposing fine, and direct that the fine be refunded.

(1) 5 Bom. H. C. Rep., Cr. Ca., 83.

(2) Beng. L. R. (Sup. Vol.) at p. 964.