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Broomfield J.

I agree with my learned brother that the only reasonable view to take in view of the provisions of the Code is to hold that imprisonment in s. 397 does include imprisonment in default of payment of fine and that the section applies to the present case. Whether the Magistrate's order that the subsequent sentence should run concurrently with the previous sentence of imprisonment in default is technically legal or not may I think be rather doubtful. But at any rate it is perfectly clear that it is an order which ought not to have been made because it is contrary to the principles of s. 64 of the Indian Penal Code, the effect of the Magistrate's order being that the accused would not have served more than a few days of his sentence of imprisonment in default. That order therefore must be set aside and the order of the sentences must be as stated by my learned brother.

Reference accepted.

Y. V. D.

APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Lokur.

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MAGAN BHIKA AND OTHERS (ORIGINAL ACCUSED NOS. 1 TO 4), APPELLANT *v.* EMPEROR.*

Criminal Tribes Act (VI of 1924), s. 23 (1) (a)—"Special reasons to the contrary"—Court to consider all circumstances—Interpretation—Indian Penal Code (Act XLV of 1860), s. 392.

In passing a sentence under s. 23 (*1*) (*a*) of the Criminal Tribes Act, 1924, the Court must in every case consider all the circumstances in determining whether there are special reasons for not inflicting the minimum sentence. The circumstance that the previous offence is not of a serious nature, and the circumstance that the offence under consideration is not of a very grave character are special reasons within s. 23 (*1*) (*a*).

The observations made by the Madras High Court in *Mayandi Thevan In re*,[1] viz., that such a special reason must be something apart from the nature of the offence such as youth, age, illness or sex, commented on.

*Criminal Appeal No. 395 of 1938.

[1] (1926) 50 Mad. 474.

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MAGAN BHIKA v. EMPEROR.

CRIMINAL APPEAL from an order of conviction and sentence passed by R. M. Bhise, Sessions Judge, Nadiad.

Magan Bhika and three others (accused Nos. 1 to 4) were charged in the Court of the Sessions Judge, Ahmedabad, for having committed certain offences, that is, accused Nos. 1, 2, 3 and 4 were charged under s. 392 of the Indian Penal Code and accused No. 3 was further charged under s. 392 of the Indian Penal Code read with s. 23 (*1*) (*a*) of the Criminal Tribes Act.

The learned Sessions Judge convicted all the accused sentencing Nos. 1, 2 and 4 to rigorous imprisonment for eighteen months each, and accused No. 3 to seven years' rigorous imprisonment. In passing the sentence upon accused No. 3, the learned Sessions Judge gave his reasons as follows :—

"Accused No. 3 has been further charged with a previous conviction under s. 457 of the Indian Penal Code rendering him liable for the minimum penalty mentioned under s. 23 (*1*) (*a*) of the Criminal Tribes Act. He admits that he is a member of a criminal tribe and also the fact of the previous conviction.

The question of sentence remains. As regards accused Nos. 1, 2 and 4 who appear to have no previous conviction I do not think it is necessary to impose a higher sentence than the one mentioned below. It is true that the offence is bad enough but these persons had not gone armed nor had they done anything beyond giving slaps and pushes to the complainant. Considering everything I think the ends of justice will be met by imposing the following sentence.

As regards accused No. 3 it appears that for his previous offence under s. 457 he had been given the benefit of s. 562, Criminal Procedure Code, but it apparently proved misplaced leniency. The period for which he was bound under that section was two years. It seems that this accused kept quiet for that period and then embarked upon his career of crime. The previous conviction was for housebreaking. This time he seems to have planned robbery and was the prime mover in it. In the circumstances I do not find special reasons required under s. 23 (*1*) (*a*) of the Criminal Tribes Act to reduce the minimum sentence prescribed therein. At first I thought that his youth (he is 25 at present) can be regarded as an extenuating circumstance but when I remember that his previous offence was housebreaking by night and this offence under s. 392 committed within about 9 months of the expiry of the bond for good behaviour taken under s. 562, Criminal Procedure Code, in the last case I do not think the facts can justify my imposing a lesser sentence than the one prescribed in s. 23 (*1*) (*a*) of the Act. I think I am bound to impose the minimum penalty mentioned in that section."

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The accused appealed.

M. R. Vidyarthi, for the accused.

Dewan Bahadur P. B. Shingne, Government Pleader, for the Crown.

BEAUMONT C. J. This is an appeal by the four accused against their conviction by the Sessions Judge of Nadiad under s. 392 of the Indian Penal Code. Accused No. 3 was also convicted under s. 392, Indian Penal Code, read with s. 23 (*1*) (*a*) of the Criminal Tribes Act. The assessors disagreed with the learned Sessions Judge and were in favour of acquittal. It is no doubt true that conviction must depend entirely or almost entirely on the evidence of the complainant. We have been carefully through the record and we think the learned Sessions Judge was right in accepting the evidence of the complainant as to the fact of robbery and the circumstances in which he was robbed, that is to say, that he was robbed in a tobacco field to which he was taken, and that it was the appellants who robbed him. We are not disposed to believe his story as to why he went to the tobacco field, namely, that he was negotiating for the purchase of tobacco for his employer. It is obvious that if he had wanted to consider the purchase of tobacco for his employer, he would not have gone to the cultivators' field where the tobacco leaf was growing; he would have gone to some tobacco factory or to an agent dealing in tobacco. I think that he had some reason for going with the accused to their field which he is unwilling to disclose, but which is not difficult to guess. But the fact that he has given a wrong reason for going to the field is no ground for holding that his evidence as to robbery is untrue. His property was found on accused No. 1, and the explanation of accused No. 1 for this is one which it is quite impossible, I think, for any Court to accept. All the accused were described with considerable accuracy in the original complaint as the learned Sessions Judge points out.

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Beaumont C. J.

We think, therefore, that the convictions must be upheld. The sentences passed on accused Nos. 1, 2 and 4 were rigorous imprisonment for eighteen months each, and we see no reason to interfere with their sentences.

Accused No. 3 was sentenced to seven years' rigorous imprisonment on the ground that that was the minimum sentence which could be inflicted under s. 23 (*1*) (*a*) of the Criminal Tribes Act. The section provides :—

"Whoever, being a member of any criminal tribe and having been convicted of any of the offences under the Indian Penal Code specified in Schedule I, is convicted of the same or of any other such offence shall, in the absence of special reasons to the contrary . . . be punished—

(*a*) on a second conviction with imprisonment for a term of not less than seven years, . . . "

Our attention has been drawn to a decision of the Madras High Court in *Mayandi Thevan, In re*,[1] in which the Court held that the mere fact that the offence is not of a very serious nature cannot form a "special reason to the contrary" for reducing the sentence, and that such a special reason must be something apart from the nature of the offence, such as, youth, age, illness or sex. We fail to see why the discretion of the Court should be fettered in the way suggested by the Madras High Court, and we think the Court must in every case consider all the circumstances in determining whether there are special reasons for not inflicting the minimum sentence. One circumstance is that the previous conviction took place a long time ago, as has already been decided by this Court, as well as by the Madras High Court. But we think that other circumstances are the nature of the offence of which the accused is convicted, and the seriousness of the previous offence, to be judged generally from the sentence imposed. Sometimes an offence may be technical robbery or dacoity which is in substance little more than a scuffle. In the present case the offence is not a very serious one of robbery, although it is not by any means an offence which is

[1] (1926) 50 Mad. 474.

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merely technical. The former conviction was in 1935 for an offence under s. 457 of the Indian Penal Code and the accused was bound over under s. 562 of the Criminal Procedure Code, so that the offence cannot, we think, have been of a very serious character. We think the trial Court ought to have taken into consideration the circumstance that the previous offence was not of a serious nature, and that the present offence is not of a very grave character. We consider that those are special reasons within s. 23 (*1*) (*a*) of the Criminal Tribes Act, and we think that the proper sentence for accused No. 3 is three years' rigorous imprisonment. We therefore confirm the convictions but reduce the sentence passed on accused No. 3 from seven years' rigorous imprisonment to three years' rigorous imprisonment.

Beaumont C. J.

Convictions confirmed, sentence on accused No. 3 reduced.

Y. V. D.

APPELLATE CIVIL.

Before Mr. Justice Rangnekar and Mr. Justice N. J. Wadia.

NARAYAN JIVAJI PATIL AND ANOTHER (ORIGINAL PLAINTIFFS NOS. 1 AND 3), APPELLANTS *v.* GURUNATHGOUDA KHANDAPPAGOUDA PATIL AND ANOTHER (ORIGINAL DEFENDANT AND PLAINTIFF NO. 2), RESPONDENTS.*

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Indian Limitation Act (IX of 1908), ss. 14, 15, and arts. 120, 144—Suit for possession—Previous suit by defendant—Injunction—Decree—Construction—Suspension—Limitation—Equitable considerations—Applicability—Adverse possession.

On September 17, 1919, respondent No. 2 adopted appellant No. 1 as a son to her deceased husband. Shortly after this certain disputes regarding the ownership of the family property arose between respondent No. 1 and his cousin's widow. They were then referred to arbitration. On February 24, 1920, a decree in terms of an award was made under which, subject to the widow's right of maintenance,

* First Appeal No. 49 of 1937.