APPELLATE CRIMINAL.

Before Mr. Justice Broomfield and Mr. Justice Macklin.

1938
November 10

EMPEROR *v.* PUNJAJI LALAJI THAKERDA (ORIGINAL ACCUSED).*

Criminal Procedure Code (Act V of 1898), ss. 123, 397, 398 (2)—"Imprisonment", if includes imprisonment in default—Accused person undergoing sentence of imprisonment in default of fine—Substantive sentence in another case—Running of sentences—Indian Penal Code (Act XLV of 1860), s. 64.

Section 64 of the Indian Penal Code provides that the imprisonment awarded in default of payment of fine shall be in excess of any other imprisonment to which the accused may have been sentenced, and that is a strong indication that imprisonment in default of payment of fine cannot be concurrent with a substantive sentence of imprisonment.

There is nothing in the language of s. 397 of the Criminal Procedure Code, 1898, itself to suggest that the word "imprisonment" as used in that section does not include imprisonment in default.

If s. 397 is not applicable, then there would be no ground for not applying the ordinary rule, viz., that each sentence takes effect from its own date.

While an accused person was undergoing a sentence of rigorous imprisonment in default of a sentence of fine for an offence under s. 379 of the Indian Penal Code, 1860, he was sentenced by another Magistrate to rigorous imprisonment for two months for an offence under s. 43 (*1*) (*b*) of the Bombay Abkari Act, 1878, and also to rigorous imprisonment for two months under s. 224 of the Indian Penal Code. The Magistrate directed that the sentence of two months' rigorous imprisonment passed under the Bombay Abkari Act, should run concurrently with the imprisonment which the accused was at that time undergoing in default of payment of fine.

The District Magistrate, having made a reference submitting that a sentence of imprisonment in default of payment of fine could not be made concurrent with the substantive sentence of imprisonment :—

Held, that the substantive sentence passed under the Bombay Abkari Act should begin on the expiry of the sentence of imprisonment in default of payment of fine and should then be succeeded by the substantive sentence of imprisonment passed under s. 224 of the Indian Penal Code.

Under rule 393 of the Rules of the Jail Manual a sentence of imprisonment in lieu of fine is to be carried out on the expiration of a substantive sentence whether the latter is annexed to the fine sentence or not. But it is difficult to see how the general rule as laid down in the Jail Manual can apply to cases where the imprisonment in default is not annexed to the substantive sentence in the same case.

CRIMINAL REFERENCE made by G. G. Drewe, District Magistrate, Ahmedabad.

*Criminal Reference No. 105 of 1938.

The following statement of facts is taken from the letter of reference.

There were three cases against Punjaji Lalaji (accused), that is, one under s. 379 of the Indian Penal Code in the Court of the Magistrate, Third Class, Prantij, and two others (Criminal Cases Nos. 84 and 85 of 1938) respectively under s. 43 (*1*) (*b*) of the Bombay Abkari Act, 1878, and s. 224 of the Indian Penal Code in the Court of the Magistrate, First Class, Prantij.

On July 13, 1938, the accused was sentenced to pay a fine of Rs. 35, in default to undergo rigorous imprisonment for one month for an offence under s. 379. The accused failed to pay the amount of the fine and he was sent to jail.

On July 26 following, the First Class Magistrate sentenced the accused to two months' rigorous imprisonment for an offence under s. 43 (*1*) (*b*) of the Bombay Abkari Act, directing that the sentence should run concurrently with the imprisonment which the accused was then undergoing in default of the payment of fine. On the same day the accused was sentenced to two months' rigorous imprisonment for an offence under s. 224 of the Indian Penal Code.

The District Magistrate, Ahmedabad, made a reference to the High Court, observing as follows :—

"On a perusal of ss. 397-398, C. P. C., and rule 393 read with rule 394 of the Jail Manual, it appears that the order regarding the mode of execution of sentences awarded by the Magistrate, First Class, in the Abkari case (case No. 84/38) is illegal with regard to the concurrence of the sentence with the sentence of s. 379, I. P. C., passed by the Third Class Magistrate. The substantive sentences of case No. 84/85 passed by the Court of the Magistrate, First Class, should be served first, and then the accused should suffer the remaining period of the sentence in default as ordered by the Third Class Magistrate under s. 379, I. P. C.

A statement furnishing information regarding the different sentences passed by different Courts with dates, etc., is enclosed for ready reference.

In the circumstances, I would request you to move the High Court to order the serving of sentences passed for offences as under :—

	Sentence.	From what date.
1.	R. I. for two months awarded in Abkari case	.. 26th July 1938 the date of sentence.

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	Sentence.	From what date.
2.	R. I. for two months in the case under s. 224, I. P. C.	After the expiry of the above sentence.
3.	The remaining period of the sentence in default awarded by Magistrate, Third Class, in the theft case.	After the expiry of the above two sentences.

against the accused as provided in G. R., H. D., No. 7383 of 21st April 1925.

Early orders in the matter are solicited."

The reference was heard.

No appearance for the accused.

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

MACKLIN J. On July 13, 1938, the accused in this case was sentenced to pay a fine or to undergo rigorous imprisonment for one month in default for an offence under s. 379 of the Indian Penal Code. That sentence was passed by the Third Class Magistrate; and the accused being unable to pay the fine immediately went to jail. On July 26 he was sentenced by another Magistrate (First Class) to rigorous imprisonment for two months under the Abkari Act (Bom. V of 1878) and also to rigorous imprisonment for two months under s. 224 of the Indian Penal Code. The First Class Magistrate directed that the sentence of two months' rigorous imprisonment passed under the Abkari Act should run concurrently with the imprisonment which the accused was at that time undergoing in default of payment of fine in the case decided by the Third Class Magistrate. The District Magistrate, Ahmedabad, has referred this matter to us upon the ground that a sentence of imprisonment in default of payment of fine cannot be made concurrent with a substantive sentence of imprisonment. He therefore recommends that the sentence of two months' rigorous imprisonment under the Abkari Act should take effect immediately, i.e., on July 26, and on the expiry of that sentence the further sentence of two months' rigorous imprisonment under s. 224 of the Indian Penal Code should take effect and that upon the expiry of this last sentence

the unexpired portion of the imprisonment awarded for default of payment of fine should be undergone.

Section 64 of the Indian Penal Code provides that the imprisonment awarded in default of payment of fine shall be in excess of any other imprisonment to which the accused may have been sentenced, and that is a strong indication that imprisonment in default of payment of fine cannot be concurrent with a substantive sentence of imprisonment. That was one of the grounds of the decision in *Emperor* v. *Subrao*,[1] where it was held that where a Court imposes two sentences of imprisonment on an accused person and also orders him to pay a fine on each of the two counts with imprisonment in default of payment of fine, it may order the substantive terms of imprisonment to run concurrently, but the terms of imprisonment in default of payment of fine must run consecutively. That was a case where the sentence of imprisonment in default of payment of fine and the substantive sentence of imprisonment were passed in the same proceeding. But here we have a case of an accused person undergoing a sentence of imprisonment in default of payment of fine in one case and a substantive sentence of imprisonment in a different case.

Here it will be necessary to consider the effect of s. 397 of the Criminal Procedure Code. That section provides that when a person already undergoing a sentence of imprisonment is sentenced to imprisonment, such imprisonment shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence. The question is whether the word "imprisonment" as used in s. 397 includes imprisonment in default. There is nothing in the language of the section itself to suggest that it does not include imprisonment in default. But it is argued that the final words "unless the Court directs that the subsequent sentence

[1] (1925) 27 Bom. L. R. 1351.

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shall run concurrently with such previous sentence" cannot be applicable to a case of imprisonment in default because that would be in conflict with s. 64 of the Indian Penal Code requiring that a sentence of imprisonment in default shall be in excess of a substantive sentence. Reference is also made to the proviso to s. 397, which is that:—

"....Where a person who has been sentenced to imprisonment by an order under s. 123 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately."

It is argued that the express mention of imprisonment by an order under s. 123 suggests that imprisonment by an order under s. 123 is not included in the term "imprisonment" used in the earlier part of the section, and by analogy imprisonment in default also is not intended to be used.

With regard to imprisonment by an order under s. 123, we have been referred to the case of *Emperor* v. *Vishnu Balkrishna*,[1] following *Emperor* v. *Arjun*,[2] and *Emperor* v. *Muthukomaran*,[3] where it has been held that imprisonment under s. 123 is not imprisonment within the meaning of s. 397. But there is the contrary authority of *Emperor* v. *Tula Khan*.[4] The *ratio decidendi* of the first three cases is based upon the wording of s. 123 itself, which does not make use of the word "sentence"; and the view of the Courts was that if imprisonment under s. 123 is not a sentence of imprisonment, then it cannot be imprisonment within the meaning of s. 397, which speaks of persons who are already undergoing a sentence of imprisonment. But obviously an interpretation of s. 123 which is based simply upon the wording of that section cannot be of assistance in deciding whether imprisonment in default of payment of fine is itself a sentence of imprisonment to be included under s. 397. Moreover it is provided by s. 64 of the Indian Penal Code

[1] (1912) 37 Bom. 178.
[2] (1909) 34 Bom. 326.
[3] (1903) 27 Mad. 525.
[4] (1908) 30 All. 334. F. B.

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that imprisonment in default of payment of fine is a sentence. Moreover the view taken in the three cases to which I have referred has been dissented from in *Emperor* v. *Tula Khan*[1]; and the wording of the proviso to s. 397, referring to a person who has been *sentenced* to imprisonment by an order under s. 123, implies that the view taken in these cases would not commend itself to the Legislature. This, however, is immaterial since, as I say, decisions as to s. 123 which are based upon the wording of s. 123 cannot help us to determine whether "imprisonment" as used in s. 397 includes imprisonment in default. *Prima facie* it would include imprisonment in default, which by virtue of s. 64 of the Indian Penal Code is a sentence; and that being so, any subsequent sentence of imprisonment (as for example the present sentence of two months' rigorous imprisonment passed under the Abkari Act) would not begin until the expiry of the sentence of imprisonment in default.

The District Magistrate asks us in effect to order that the imprisonment in default which the accused was undergoing on July 26 should be interrupted and continued after the expiry of the two substantive sentences which he has been awarded by the First Class Magistrate. We are unable to find any authority for such an interruption. The nearest approach to any authority is to be found in s. 398 (*2*), which provides that when an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, and the person undergoing the sentence is after its execution to undergo a further substantive sentence of imprisonment, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence. But the effect of this section is to postpone the imprisonment awarded in default of payment of fine in one case to the expiry of the substantive sentence in another case; it is no

[1] (1908) 30 All. 334, F. B.

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authority for the interruption of imprisonment in default of payment of fine.

We have also been referred to r. 393 of the Jail Manual, under which sentences of imprisonment in lieu of fine are always to be carried out on the expiration of substantive sentences, whether the latter are annexed to the fine sentence or not. This rule appears to be based upon Government Resolution, No. 7383 dated April 21, 1925, which dealt with the case of a man who was sentenced to a fine or six weeks' rigorous imprisonment in default under ss. 379 and 114 of the Indian Penal Code and at the same time to two months' rigorous imprisonment under s. 324 of the Indian Penal Code. In that case it had been ordered that the sentence in default of payment of the fine should be carried out first. The case, however, on its own facts gave rise to hardship and that is why the Inspector General of Prisons made the recommendation which we now find embodied in r. 393 of the Jail Manual. Upon the facts of that particular case, viz., a sentence of imprisonment in default and a substantive sentence of imprisonment also having been passed in the same case, there could be no possible objection to the sentence of imprisonment in default being carried out after the expiry of the substantive sentence. But it is difficult to see how the general rule as laid down in the Jail Manual can apply to cases where the imprisonment in default is not annexed to the substantive sentence in the same case, since, on the view that we take of s. 397, that would be opposed to the provision requiring that when a person is already undergoing imprisonment (which in our view would include imprisonment in default) his subsequent sentence or imprisonment should take effect after the expiry of the first imprisonment. It is moreover worthwhile pointing out that here, if s. 397 is not applicable, then there would be no ground for not applying the ordinary rule, viz., that each sentence takes effect from its own date; in which case the substantive sentence of July 26 would begin during the continuance of

the sentence in default and would in effect be concurrent with it.

For these reasons we accept the reference and set aside that part of the order of the First Class Magistrate which directs that the substantive sentence of imprisonment should be concurrent with the sentence which the accused is already serving in default of payment of fine, but order that the substantive sentence passed under the Bombay Abkari Act should begin on the expiry of the sentence of imprisonment in default of payment of fine and should then be succeeded by the substantive sentence of imprisonment passed under s. 224 of the Indian Penal Code.

BROOMFIELD J. The learned Government Pleader has contended that in s. 397 of the Criminal Procedure Code the words "sentence of imprisonment" mean a sentence of substantive imprisonment and do not include imprisonment in default of payment of a fine. I can see no reason why we should adopt this construction which requires us in effect to add a word to the section which is not there. In the following s. 398 we have a reference to a substantive sentence of imprisonment, so that when the Legislature means substantive imprisonment it says so. Neither in these two sections nor elsewhere in the Act can I find any justification for the limitation which is sought to be placed on the word "imprisonment" here. The second proviso which was added in 1923 seems to me to indicate that imprisonment under s. 123 of the Code in default of furnishing security is imprisonment within the meaning of the section. It was at one time doubted whether that was so. This High Court following the Madras High Court took the view that because s. 123 does not use the word "sentence" but speaks of an accused person being committed to prison, a person so committed was not undergoing a sentence of imprisonment within the meaning of s. 397. There was a conflict of authority on the point. As my

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learned brother has pointed out, the Allahabad High Court took a different view. Reference may also be made to *King-Emperor* v. *Nga Pye*[1] and *King-Emperor* v. *Nan E.*[2] Since in the proviso the words used are "where a person who has been *sentenced to imprisonment* by an order under s. 123," it seems pretty clear that the legislature did not accept the view taken by this High Court and the Madras High Court.

But, however that may be, there was never any doubt at all that imprisonment in default of payment of fine is a sentence of imprisonment. Section 64 of the Indian Penal Code provides that it shall be competent to the Court which sentences an offender to direct *by the sentence* that, in default of payment of the fine, the offender shall suffer imprisonment.

Supposing for the sake of argument that s. 397 did not apply, the position would then be that according to the ordinary rule the sentence of imprisonment in default of fine would have taken effect from its date July 13, and the subsequent sentence under the Bombay Abkari Act would have taken effect from its date, of July 26, and except for a few days the former sentence would in effect have been rendered nugatory. The only provision of the Criminal Procedure Code which allows a sentence of imprisonment in default to be postponed to a substantive sentence of imprisonment in a separate case is s. 398 (2). That provision does not apply to the present case, for here there was no award of imprisonment in default of payment of a fine annexed to a substantive sentence of imprisonment. Moreover even in s. 398 there is no support for the course now suggested, viz. that the sentence of one month's imprisonment in default shall be interrupted and split up and that the balance not undergone should be undergone at the expiry of the two subsequent sentences.

[1] (1930) 9 Ran. 110.

[2] (1931) 9 Ran. 612.

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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.

1938
December 8

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.