[IN THE COURT OF CRIMINAL APPEAL]

1959 *Present :* **Basnayake, C.J. (President), Pulle, J., and H. N. G. Fernando, J.**

THE QUEEN *v.* V. PREMADASA

APPEALS NOS. 147–149 OF 1958, WITH APPLICATIONS NOS. 184–186

S. C. 20—M. C. Colombo, 41225

Sentence—Previous convictions of accused—Procedure—Prevention of Crimes Ordinance, ss. 2, 6—Criminal Procedure Code, s. 253.

The power to impose the imprisonment prescribed in section 6 of the Prevention of Crimes Ordinance is in addition to any punishment *other than imprisonment* to which the convicted person may be liable. It has no application to a case where the Court has power to impose a long term of imprisonment in respect of the offence of which the accused has been found guilty.

It is not permissible, when imposing sentence, to take into account previous convictions alleged against the accused but neither admitted by him nor proved.

In proceedings against accused persons with previous convictions the procedure prescrib d in section 2 of the Prevention of Crimes Ordinance and in section 253 of the Criminal Procedure Code should be strictly followed.

APPEALS, with applications, against certain convictions in a trial before the Supreme Court.

L. W. de Silva, with *D. C. W. Wickremasekara*, for 3rd Accused Appellant.

1st Accused-Appellant in person.

4th Accused-Appellant in person.

Ananda Pereira, Senior Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 23, 1959. BASNAYAKE, C.J.—

The question that arises for decision in this appeal is whether the sentence passed on the 4th accused, who was convicted along with two others of charges of robbery, should be reduced on the ground that the learned Commissioner in imposing his sentence took into account two previous convictions for theft alleged against him but neither admitted by him nor proved

After the jury returned the verdict learned Crown Counsel stated "1st accused has seventeen previous convictions". Each of them appears to have been described by Crown Counsel by reference to the date of offence, nature of offence and amount of punishment, and the accused asked whether he admitted the convictions. He admitted nine of them. Thereafter Crown Counsel stated: "This accused is liable to enhanced punishment in terms of section 6 of the Prevention of Crimes Ordinance."

To an inquiry by the Commissioner of Assize whether the accused had admitted his previous convictions before the Magistrate, Crown Counsel stated that no admission had been recorded.

Next Crown Counsel stated: "The 3rd accused has 3 previous convictions", and proceeded to describe them in the same manner as he described the convictions of the 1st accused. The accused admitted all the convictions. Crown Counsel then stated as in the case of the 1st accused that the 3rd accused was also liable to enhanced punishment under section 6 of the Prevention of Crimes Ordinance.

The accused were found guilty of offences punishable with fourteen and twenty years' rigorous imprisonment respectively and the Commissioner had power to impose the maximum sentence if he thought it fit to do so. That being the case it is not clear why learned Crown Counsel drew the learned Commissioner's attention to section 6 of the Prevention of Crimes Ordinance. That section empowers a court before which a person who has previously twice or oftener been convicted of any crime and has been sentenced on such convictions to undergo rigorous imprisonment exceeding in the aggregate one year is again convicted of a crime, to sentence him to rigorous imprisonment for

a period not exceeding two years in addition to any punishment other than imprisonment to which he may be liable, in any case in which the court would not otherwise have jurisdiction so to do. It has no application to a case such as this where the court has power to impose such long terms of imprisonment in respect of the very offences of which the accused have been found guilty. It should be noted that the power to impose the imprisonment prescribed in the section is in addition to any punishment *other than imprisonment* to which the convicted person may be liable. This section has been discussed in several decisions of the Supreme Court. It is sufficient to refer to one of them, *Pillai v. Sirisena* [1].

Lastly Crown Counsel stated: "The 4th accused has two previous convictions". They were for offences committed on the same day in November 1956. The accused did not admit either of the convictions. Crown Counsel volunteered the statement that no admission had been recorded by the Magistrate.

The Commissioner of Assize then imposed the following sentences on the accused :—

1st accused, 10 years' rigorous imprisonment on count 1, and 15 years' rigorous imprisonment on count 2,

3rd accused, 8 years' rigorous imprisonment on count 1, and 10 years' rigorous imprisonment on count 3,

4th accused, 8 years' rigorous imprisonment on count 1, and 10 years' rigorous imprisonment on count 3.

The punishment imposed on the 3rd accused who admitted three previous convictions, on the last of which he had been sentenced in 1945 to 8 years' rigorous imprisonment, and on the 4th accused who did not admit any previous convictions and against whom none were proved, is the same. It is difficult to escape the conclusion that the previous convictions alleged against the 4th accused though neither admitted nor proved were taken into account by the learned Commissioner in determining his sentence. There is no evidence that he played a prominent part in the robbery. The main evidence against him is the existence of his palm print (P5) on the near side rear mudguard and a finger print (P4) on the plated portion of the near side rear door of the car which the accused used for getting away after the crime.

The learned Commissioner appears to have been influenced by material which was not in evidence in determining the sentence on the 4th accused. He should not have been treated in the same way as the 3rd accused who admitted previous convictions for crimes. We accordingly reduce his sentence on count 1 to a term of rigorous imprisonment for four years and on count 3 to a term of rigorous imprisonment for 5 years, the sentences to run concurrently.

Before we part with this judgment we must express our dissatisfaction with the way the Magistrate who held the inquiry into these offences has acted. He does not seem to have given his mind to the documents

[1] *(1945) 31 C. L. W. 32.*

he was signing or paid any regard to the functions he had to perform under the Prevention of Crimes Ordinance. We can find no excuse for his appending the following certificate under his hand to a blank form in which he purports to have acted under section 2 (3) of the Prevention of Crimes Ordinance, but which does not show that he has in fact done so :—

> " I hereby certify that the above record was taken in my presence and contains accurately the whole of the examination of the accused and that it was not practicable for me to record it in the Sinhalese/ Tamil language in which it was made."

Magistrates who have statutory functions to perform should pay heed to the statutes under which they act and carefully observe their requirements and not act in a perfunctory manner, as the Magistrate has acted in the instant case.

We wish to take this opportunity of drawing the attention of all Magistrates to the necessity of complying strictly with the requirements of section 2 of the Prevention of Crimes Ordinance. It should be borne in mind that sub-section (5) of that section provides that any statement or evidence recorded and any document tendered under it may be put in and read as evidence at the trial at such time after the conviction as it becomes material to inquire into the past record and character of the accused.

Magistrates should also note that where the accused when called upon to admit or deny separately each of the convictions set forth in the certificate issued by the Registrar of the Finger Prints and Identification Office either does not make a statement or makes a statement denying all or any of the convictions the Magistrate after recording the statement (if any) in the prescribed manner should proceed to record in respect of such of the convictions as the accused does not admit the evidence prescribed in section 4.

The procedure to be followed after an accused person with previous convictions has been convicted at a trial in the Supreme Court is to be found in section 253 of the Criminal Procedure Code. The requirements of paragraph (*b*) of sub-section of that section have not been observed in the instant case. There has been no inquiry concerning the previous convictions which the accused denied. Although the proceedings under section 2 of the Prevention of Crimes Ordinance appear to have been forwarded to the Attorney-General long before the date of this trial it is deplorable that no endeavour was made to produce the evidence necessary for proving at the trial the previous convictions which the accused denied.

The appeals of the 1st and 3rd accused are dismissed and their applications are refused.

Subject to the variation in the sentence, the application and appeal of the 4th accused are also dismissed.

Appeals of 1st and 3rd accused dismissed.

Sentence on 4th accused reduced.