1951 *Present:* **Gratiaen J.**

IN RE VELIN *et al.*

In revision under Section 356 of Criminal Procedure Code

M. C. Matugama, 11,984; M. C. Balangoda, 24,590; M. C. Avissawella, 53,121; M. C. Kalutara, 10,325; M. C. Gampaha, 179; M. C. Colombo, 6,203; M. M. C. Colombo, 81,462.

Sentence—Payment of Fines (Courts of Summary Jurisdiction) Ordinance, No. 49 of 1938—Purposes for which it was designed—Sentence of fine in first instance—Duties of sentencing Court—Sections 2, 3, 4, 6 and 8—Criminal Procedure Code, s. 312 (4) (c).

Where an offender is sentenced only to pay a fine, a Court of summary jurisdiction must comply with the following imperative provisions of the Payment of Fines (Courts of Summary Jurisdiction) Ordinance, No. 49 of 1938:—

(*a*) The means of the offender must, among other considerations, be taken into account in fixing the amount of the fine (Section 2).

(*b*) Unless special circumstances (the nature of which must be recorded in the proceedings) are proved or admitted to exist, at least seven days time must be given for the payment of the fine; the grant of further extensions of time is permissible (Section 3); an order, therefore, that a fine should be paid forthwith, except in one or other of the grounds specified in Section 3, is not authorised by-law.

(*c*) Where time for the payment of a fine is granted as required by Section 2, it is illegal on that occasion to impose a term of imprisonment in default of payment (Section 4); there are a few special exceptions to this general rule, but if they are considered to apply, the Magistrate's decision to that effect must be based on reliable material and must be recorded in the proceedings, together with the reasons for such decision—proviso to Section 4 (1), and Section 4 (2).

(*d*) Generally, and subject to these few exceptions, a Magistrate, after the date of conviction, is precluded by law from imposing a term of imprisonment on a defaulter unless, on an occasion subsequent to the conviction, there has been an inquiry as to the defaulter's means—Section 4 (3); if, after such inquiry, the Magistrate is satisfied that the defaulter does not possess the means to pay the fine, there is no jurisdiction to commit him to prison for default.

(*e*) In any event it is not obligatory on a Magistrate to commit a defaulter to prison; an order for detention in the precincts of the Court is permissible, and may in some cases be quite appropriate—Section 6.

(*f*) It is illegal to commit a defaulter under 21 years of age to prison unless the conditions laid down by Sections 8 have been satisfied.

Held further, that the practice of ordering "double security" as a condition of the granting of time to pay a fine is unwarranted. The provisions of Section 312 (4) (*c*) of the Criminal Procedure Code must now be construed as having been repealed to the extent to which they are inconsistent with the explicit provisions of the Payment of Fines Ordinance of 1938.

ORDERS made in revision under Section 356 of the Criminal Procedure Code.

T. S. Fernando, Crown Counsel, for the Attorney-General, on notice by Court.

Cur. adv. vult.

April 25, 1951. GRATIAEN J.—

Statistics recently furnished by the Prison authorities to the Criminal Courts Commission, of which I am a member, disclosed that no less than 6,100 (including 845 youthful offenders) out of 12,068 convicted persons admitted to jail during the year 1950 had in the first instance been sentenced only to pay fines, but had, owing to default of payment and for no other reason, been sentenced *automatically* to terms of imprisonment. The total number of prison inmates belonging to this category on April 17, 1951, was as high as 171. The provisions of the Payment of Fines (Courts of Summary Jurisdiction) Ordinance, No. 49 of 1938, are specially designed to prevent such a lamentable state of affairs. The figures disclosed led me to doubt whether the beneficial provisions of this Ordinance are as conscientiously applied and clearly understood by most Magistrates in the Island as they ought to be. In order to explore the matter further I decided, under the powers vested in me as a Judge of the Supreme Court under Section 356 of the Criminal Procedure Code, to call for the records in a number of cases, selected at random from different Courts in the Island, in which convicted persons are now serving terms of imprisonment for non-payment of the fines imposed on them. When these records arrived, I requested the Attorney-General's Department to be good enough to arrange for Crown Counsel to assist me in examining these records. I am much indebted to Mr. T. S. Fernando, Senior Crown Counsel, for the help he has given me in arriving at a decision in the matter, and particularly for appearing so readily before me at fairly short notice.

It is convenient that the relevant facts in each of the proceedings before me should be set out, after which I shall proceed to summarise the main provisions of the Payment of Fines (Courts of Summary Jurisdiction) Ordinance, No. 49 of 1938 (to which I shall hereafter refer as " The Ordinance, "). The legality or propriety of the order for imprisonment in each case can then be considered:—

(1) In *M. C. Matugama No. 11,984* the accused was convicted of two offences on March 14, 1951, and sentenced to pay fines aggregating Rs. 125. At the same time and in the same order a term of 3 months rigorous imprisonment was imposed in default of payment. He was granted time until March 28, to pay the fines, provided that he furnished " double security "—i.e., in the sum of Rs. 250 but as he was unable to pay the fines or to furnish the security, he was forthwith committed to prison in the Hulftsdorp Jail for a period of three months.

(2) In *M. C. Balangoda No. 24,590* the accused was convicted of two offences on April 6, 1951, and was sentenced to pay fines aggregating

Rs. 110. The Magistrate had recorded that the accused was "not paying the fine" (whatever that might mean). A default term of 2 months rigorous imprisonment was accordingly imposed and the accused was thereupon committed to prison in the Hulftsdorp Jail for a period of two months.

(3) In *M. C. Avissawella No. 53,121* the accused was convicted of an offence on March 13, 1951, and the case was put off for sentence till March 20. On that date he was sentenced to pay a fine of Rs. 75. At the same time and in the same order a term of 2 months rigorous imprisonment was imposed in default of payment. No time was granted for the payment of the fine, and as he was unable to pay the amount he was forthwith committed to prison in the Hulftsdorp Jail for a period of 2 months.

(4) In *M. C. Kalutara No. 10,325* the accused was convicted of an offence on April 12, 1951, and was sentenced on that date to pay a fine of Rs. 100 or in default to undergo a term of 3 months rigorous imprisonment. He was allowed time until April 26 to pay the fine *provided that he furnished* "double security"—i.e., in the sum of Rs. 200. He was unable, however, to pay the fine or furnish the security on the date of his conviction and he was forthwith committed to prison in the Kalutara Jail for a period of three months.

(5) In *M. C. Gampaha No. 179* the accused was convicted of an offence on March 15, 1951. He was sentenced to pay a fine of Rs. 10 or in default to undergo a term of 6 weeks rigorous imprisonment. As he was unable to pay the fine he was forthwith committed to prison in the Hulftsdorp Jail for a period of 6 weeks

(6) In *M. C. Colombo No. 6,203/c* the accused was convicted of an offence on January 13, 1951. He was "imprisoned till the rising of Court" and was also sentenced to pay a fine of Rs. 750 or in default to undergo a term of 6 months rigorous imprisonment. He was unable to pay this fine and was on the same day committed to prison in the Hulftsdorp Jail for a period of 6 months.

(7) In *M. M. C. Colombo No. 81,462* the accused was convicted of an offence on April 11, 1951, and was sentenced to pay a fine of Rs. 75 or in default to undergo a term of 6 weeks rigorous imprisonment. There appears to be a record to the effect that time for the payment of the fine was granted until April 25, 1951. Nevertheless for some reason which is not stated in the record he was on April 11, 1951, committed to prison for a period of 6 weeks rigorous imprisonment.

Was the order for the imprisonment in the case of each of these defaulting persons justified in law? Let me first examine the provisions of the Ordinance with special reference to their historical development. They are substantially taken over from certain parts of the Criminal Justice Act, 1914, and of the Money Payments (Justices Procedure) Act, 1935, of England. During the five years preceding the passing of the Act of 1914 the average number of annual committals to English prisons in default of the payment of fines was as high as 83,187. It was felt that this state of affairs could only be explained by the *inability* of most of the persons concerned to pay the fines imposed on them at

the time of convictions and that many of the resulting committals were in effect " punishments for poverty ". At that time the law of England—which was similar to that laid down in Section 312 of the Criminal Procedure Code of this Country—*only authorised but did not compel* Magistrates to allow time for the payment of fines. Moreover, Magistrates were then required, *at the time of ordering a convicted person to pay a fine*, to fix a term of imprisonment in default of payment. Finally there was no statutory requirement that the amount of the fine should bear some reasonable relation to the offender's income. The Act of 1914 which was described as "An Act to diminish the number of cases committed summarily to prison ", Made it *obligatory* to allow at least seven days for the payment of a fine except for very special reasons which must be stated in the warrant of commitment. The judicial duty *to have regard to the means of the offender* when fixing the amount of the fine was also expressly imposed on Magistrates. The position resulting from this legislation was that by 1934 the annual average number of committals for default of payment had considerably declined in comparison with the figures before the passing of the Act of 1914. It was considered, however, that there was still room for improvement, and that too many convicted persons whose offences were not in the first instance considered to call for terms of imprisonment were nevertheless committed to prison through *inability* (*as opposed to wilful refusal or neglect*) to pay their fines. A Departmental Committee was accordingly appointed to investigate the question, and on its recommendation the Money Payments (Justices Procedure) Act, 1935, was passed. This Act introduced substantial amendments to the earlier Act. The effect of the new legislation *inter alia* was (1) to limit the categories of " special reasons " which would justify non-compliance with the obligation to give time for the payment of fines, (2) to prohibit, as a general rule, any Court of summary jurisdiction, when giving time for the payment of a fine in terms of this earlier obligation, from imposing *at the same time* a term of imprisonment in default of payment. *This could only be done after a subsequent inquiry into the means of the defaulter had been held.* The result of this " legislative assault on imprisonment for poverty " (" Penal Reform in England " page 27) was that the number of annual committals for default in England sharply declined until the total figure for the year 1947 was only 2,592. The figures for 1948, 1949 and 1950 are not available to me. This decline was " manifestly due to the obligations placed upon the Courts by successive Acts of Parliament and to the increased attention which has been directed from various quarters to *the great need of avoiding imprisonment wherever possible without detriment to the ends of justice*". (The Journal of Criminal Science—Volume 2—page 47.) Indeed the successful working of the Act was in large measure attributable to the willingness with which the obligations so imposed on the Magistrates were fulfilled by them.

In 1938 the Legislature in Ceylon decided to introduce similar legislation with a view to achieving the same results. The Ordinance of 1938 now imposes the same obligations on Courts of summary jurisdiction as those which were imposed by Parliament on the English Courts in 1935. Unfortunately, the Ordinance did not come into operation immediately.

The Proclamation in *Gazette* No. 8,697 of December 20, 1940, fixing *February 1st, 1941*, as the date on which it was to come into operation seems to have received none of the publicity which the new policy demanded. In the result, the provisions of the Ordinance seem to be known, notwithstanding the passage of ten years, by hardly anyone, and to be observed by extremely few (if any) Magistrates. The Courts of summary jurisdiction continue—presumably, through ignorance of the true legal position—to violate the imperative provisions of the Ordinance. The " bad old habit "—both obsolete and in most cases expressly prohibited—of passing an *automatic* sentence " to pay a fine of Rs. X or in default to undergo Y months rigorous imprisonment " still persists. The consequence is that in this small country the number of convicted persons (unnecessarily, thoughtlessly, and very often, in my belief, illegally) sentenced to imprisonment for non-payment of fines in 1950 *was more than double the number of persons committed in similar circumstances in England in 1947.*

I had occasion in September, 1949, to refer to the apparent disregard by Magistrates of the provisions of the Payment of Fines Ordinance. (*Wije v. Abeysundera*, 51 N.L.R. 71), and I am discouraged to find that the position has not improved since then. It is to be hoped that the fact that the Ordinance has been in operation since February, 1941, will even now receive some belated publicity, and that the indefensible incarceration, contrary to law, of convicted persons *whose offences were considered to be adequately met by the imposition of fines which they can afford to pay*, will forthwith cease. It is equally desirable that in future every case of apparent non-compliance with the provisions of the Ordinance should be brought to the notice of the Attorney-General by the Prison authorities, so that, after examining the record, he may take steps, wherever necessary, to ensure that any improper or premature committal to imprisonment for default of payment of a fine is appropriately revised by this Court. Such a precaution is of special importance in cases where convicted persons, ignorant of their statutory rights, are not legally represented in the lower Court.

An examination of the provisions of the Payment of Fines (Courts of Summary Jurisdiction) Ordinance, No. 49 of 1938, makes the following propositions abundantly clear in regard to any case in which a Magistrate considers that the mere imposition of a fine on a convicted person would meet the ends of justice:—

(*a*) that the means of the offender must, among other considerations, be taken into account in fixing the amount of the fine (Section 2);

(*b*) that unless special circumstances (*the nature of which must be recorded in the proceedings*) are proved or admitted to exist, at least seven days time *must* be given for the payment of the fine ; that the grant of further extensions of time is permissible (Section 3); and that in consequence, an order that a fine should be paid forthwith, except in one or other of the grounds *specified* in *Section 3*, is not authorised by law;

(*c*) that where time for the payment of a fine is granted as required by Section 2, it is illegal *on that occasion* to impose a term of imprisonment in default of payment (Section 4); there are a few special exceptions to this general rule, but if they are considered to apply, *the Magistrate's decision to that effect must be based on reliable material and must be recorded in the proceedings*, together with the reasons for such decision;—*proviso to Section 4 (1), and Section 4 (2)*;

(*d*) that generally, and subject to these few exceptions, a Magistrate, after the date of conviction, is precluded by law from imposing a term of imprisonment on a defaulter unless, on an occasion subsequent to the conviction, *there has been an inquiry as to the defaulter's means—Section 4 (3)*; if, after such inquiry, the Magistrate is satisfied that the defaulter does not possess the means to pay the fine, there is no jurisdiction to commit him to prison for default. (*R. v. Woking Justices (1942) 2 K. B. 248*);

(*e*) that in any event it is not obligatory on a Magistrate to commit a defaulter to prison; an order for detention in the precincts of the Court is permissible, and may in some cases be quite appropriate—*Section 6;*

(*f*) that it is illegal to commit a defaulter under 21 years of age to prison unless the conditions laid down by *Section 8* have been satisfied.

It is clear that if the spirit of the Ordinance is to be conscientiously applied so that the mischief which it seeks to avoid may be remedied, some additional expenditure of time will be involved in the business of a Magistrate's Court where the pressure of work is already considerable. *But there can be no excuse for circumventing the Ordinance.* Prosecuting officers should be ready, at the appropriate time, with the evidence which must be placed before the Court at the "means inquiry" which must normally follow each default of payment. The services of probation officers (*under Section 7*) for the supervision of convicted persons pending payment should be more readily availed of, and their reports under Section 7 (3) would be of great assistance at the subsequent "means inquiry". If one starts with the hypothesis that there has already been a judicial decision that the convicted man deserves to be spared the stigma of imprisonment, it is in the public interest that imprisonment in such a case should as far as possible be avoided. What happens invariably or at any rate far too often today is that an accused who was ordered in the first instance to pay a small fine is automatically committed to prison on the same day through non-compliance by the Magistrate with the imperative provisions of the Ordinance. He is then placed under arrest and transported at the public expense to a prison which is often several miles away from the place of arrest. He is there detained for several weeks, also at the public expense. The cost to the public revenue far exceeds the amount of the fine, and the resulting profit to society or to the convicted man is precisely "nil". Indeed, the whole transaction is positively harmful to all concerned and is calculated to bring the administration of criminal justice into disrepute.

I shall now proceed to consider whether the committal to imprisonment in each of the cases which I have sent for was justified. It is apparent that in each of the cases before me the commitment of the defaulting accused to a term of imprisonment for non-payment of the fine or fines imposed on him was premature, unauthorised and in express contravention of the provisions of the Ordinance. In some of the cases the accused was not, as he should have been, granted time for the payment of his fine as required by Section 3. I say so because there is no finding on the record that any of the reasons specified in sub-section 3 existed which would justify a refusal to allow time for payment. In two of the cases the accused was granted time for payment, but only upon the condition that he should furnish " double security ". Presumably the learned Magistrate in these cases purported to act under the provisions of Section 312 (4) (*c*) of the Criminal Procedure Code which authorises an order for security in cases " where an offender had been sentenced to fine only *and* to imprisonment in default of the fine." In my opinion the provisions of Section 312 must now be construed as having been repealed to the extent to which they are inconsistent with the explicit provisions of the Payment of Fines Ordinance of 1938 which was enacted at a later date. In other words, the operation of Section 312 (4) (*c*) is now applicable only in cases where a Magistrate is empowered to fix a term of imprisonment in default of payment—that is in a contingency which is specifically mentioned in the New Ordinance. In the case from Balangoda the accused was not given time to pay the fine but the warrant of commitment to prison did not issue until the learned Magistrate had recorded that the accused was " not paying the fine." The reason for non-payment is not recorded. If one assumes that the learned Magistrate was aware of the provisions of the Ordinance, he was presumably purporting to refuce time for the payment of the fine on the ground that " upon being asked by the Court whether he desired that time should be allowed for payment, the offender did not express any such desire ". (*Vide* Section 3 (1).) In the present case however it may well be, and indeed it seems highly probable, that the only reason for non-payment of the fine on the date of conviction was that the accused did not possess the means to pay the fine forthwith. I therefore hold that in this case too the warrant of commitment was premature and unauthorised by law. For the reasons I have given I quash the orders committing the accused to jail in M. C. Matugama No. 11,984, M. C. Avissawella No. 53,121, M. C. Kalutara No. 10,325, M. C. Colombo No. 6,203/c, M. M. C. Colombo No. 81,462 and M. C. Balangoda No. 24,590. I order that each of these accused persons should forthwith be released from prison, and that the Superintendent of the Hulftsdorp Jail should be notified immediately of these orders. The order for committal in M. C. Gampaha No. 179 was also premature and unauthorised by law, but in this case I understand that the accused has already served the sentence improperly passed upon him. I am therefore powerless to give him redress.

I desire, in conclusion, to state that I do not wish to be unjust to the Magistrates. I am very conscious that the pace at which business is conducted in their extremely busy Courts is such that there is often

little time available for taking a detached view of the principles of modern criminal policy. Moreover, it is by no means an easy matter for any person, with far more leisure at his disposal than Magistrates possess, to find his way through the maze of legislation which in recent years has been added from time to time to our increasingly cumbersome Statute Books. Time was, I understand, when it was the practice for the Attorney-General to issue circulars to Magistrates in order to bring to their notice the effect of any new legislation which directly concerned the administration of business in their Courts. This practice has been abandoned in recent years—no doubt because changes in the Constitution have curtailed the supervisory functions previously exercised by the Attorney-General over the minor judiciary. It is very desirable, I think, that some machinery should be devised whereby the " appropriate authority " can, *without in any sense interfering with the independence of the minor judiciary*, keep Magistrates constantly advised on matters of general policy and at any rate inform them of the reforms which new legislation is intended to introduce. Who this " appropriate authority " should be, and what machinery should be devised to achieve the desired end, are subjects which fall outside my province. We were recently reminded by the Privy Council that " there is no presumption that the people of Ceylon know the law of England ". *Nadarajah Chettiar v. Tennekoon* [1]. Let us at least avoid the reproach that it is doubtful whether the Magistrates in this country are fully acquainted with even the local statute law which vitally affects the efficient administration of criminal justice in the Courts.

In conclusion I desire to say that the practice of ordering " double security " as a condition of the granting of time to pay a fine is unwarranted and should, in my opinion, be forthwith discontinued. To my mind it savours too much of a money-lending transaction. To order a man, on pain of imprisonment, to furnish security in double the amount of a fine which he cannot pay immediately, is a travesty of justice and a cynical violation of the spirit of the Ordinance.

Orders committing the accused to jail quashed.