

1937

Present: Abrahams C.J. and Maartensz J.

WIJEYSURIYA v. SILVA.

563—P. C. Tangalla, 27,567.

Maintenance—Arrears in respect of several months—One warrant in respect of more than one breach—Imprisonment for six months under one warrant—Ordinance No. 19 of 1889, s. 9.

Under section 9 of the Maintenance Ordinance a Magistrate has power to issue one warrant in respect of more than one breach of an order for the payment of maintenance and to include in it a sentence of one month's imprisonment for each breach.

CASE referred by Maartensz J. to a Bench of two Judges.

The question referred was whether it was competent to a Police Magistrate under section 9 of the Maintenance Ordinance to sentence the respondent who was in arrears in respect of an order of maintenance for several months to a term of six months' imprisonment under one warrant.

E. B. Wickramanayake, for appellant.—Section 9 of the Maintenance Ordinance limits the term of imprisonment to one month no matter how many months the offender is in arrears. For every breach of the order the applicant should apply for a warrant and if she permits him to fall into arrears and apply for a warrant the Court cannot inflict a cumulative term of imprisonment. She must suffer for her negligence.

Section 488 of the Indian Criminal Procedure Code is the corresponding section to our section 9, and a Bench of three Judges of the High Court held this view in *Queen Empress v. Narain*¹.

S. W. Jayasuriya, for respondent.—The form of the warrant in the Schedule to our Ordinance makes it clear that a single warrant could be issued in respect of more than one breach of the order. The section also contemplates a cumulative warrant and a cumulative punishment (*Sivakaman v. Velupillai*²).

The Full Bench decision in *Queen Empress v. Narain* (*supra*) has no reference to the amendment of section 316 of the Indian Code of 1861 by introducing the new section 488. Under the old section the term of imprisonment was limited to one month and its amendment by section 488 clearly indicates that they intended to impose a heavier term of imprisonment. In *Allapichai Ravuther v. Mohidin Bibi*³, two Judges held that this was the correct interpretation and disagreed with the view taken in *Queen Empress v. Narain* and the Madras decision has been followed in *Bhiku Khan v. Zahuran*⁴; *Emperor v. Budhu Ram*⁵; and *Zaw Ta v. Emperor*⁶.

Cur. adv. vult.

May 6, 1937. ABRAHAMS C.J.—

The appellant in this case was ordered by the learned Police Magistrate, Tangalla, to pay a monthly sum in respect of the maintenance of his infant daughter by his wife the respondent. He fell many months into

¹ *I. L. R. 9 All. 240.*

² *34 N. L. R. 80.*

³ *I. L. R. 20 Mad. 3.*

⁴ *I. L. R. 25 Cal. 291.*

⁵ (1919) *A. I. R. Lahore 197.*

⁶ (1914) *A. I. R. Lower Burma 163 (2).*

arrears and eventually, at the instance of the respondent, a distress warrant was levied which proved ineffective, and, purporting to act under section 9 of the Maintenance Ordinance, 1889, the Magistrate sentenced him to rigorous imprisonment for six months. Against this order for imprisonment he appealed, and Maartensz J. before whom the appeal was listed referred the case to a Bench of two Judges on the point as to whether the provision of law under which the order was made enables a sentence of more than one month's imprisonment to be passed. The point is one of considerable importance as it is a question which, as Maartensz J. says, often comes before the Court. The section reads as follows :—

“9. If any person against whom an order is made under section 3 neglects to comply with the order, the Magistrate may for every breach of the order issue a warrant directing the amount due to be levied in the manner by law provided for levying fines imposed by Magistrates in the Police Courts, and may sentence such person for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant to simple or rigorous imprisonment for a term which may extend to one month.”

Strangely enough the interpretation of this section appears to have come before this Court on only one occasion when Macdonell C.J. was of the opinion in *Sivakamam v. Velupillai*¹, that a sentence of six months' imprisonment following upon a single warrant issued in respect of eighteen months' maintenance was perfectly valid. The learned Chief Justice said :—

“It was admitted in argument that if a warrant had been taken out at the end of each one of those eighteen months and the respondent had received a month's imprisonment under each one of those warrants this would have been perfectly lawful under section 9. I do not see that the mere fact that one warrant has been issued for the whole amount at all invalidates what the Magistrate has done. The Magistrate has not made order of imprisonment beyond the six months which the law allows him in default of payment.”

It would appear from this judgment that the point contested was whether a single warrant could be issued in respect of more than one breach of the Magistrate's order, and that it was not argued that imprisonment could not be cumulative but must be limited to one month no matter how many months the offender was in arrears.

The form of Warrant of Imprisonment given in the Schedule to the Ordinance, and which is directed by section 18 to be used in a case as so required, clearly implies that one warrant can do duty in respect of more breaches than one of the order. It was however pointed out by Maartensz J. in his reference, and it has been also pointed out at this hearing, that there is a conflict of authority in the Indian Courts on the interpretation of section 488 of the Criminal Procedure Code, which is for all intents and purposes identical with section 9 of the Maintenance Ordinance. In the *Queen Empress v. Narain*², a Bench of three, of which those distinguished Judges Edge C.J. and Straight J. formed part, were

¹ 34 N. L. R. 80.

² I. L. R. 9 All. 240.

of the opinion that where a warrant was issued in respect of an accumulation of arrears of maintenance the term of imprisonment to be inflicted should not exceed one month. So far as I understand this judgment it appears to lay down that if it is sought to recover an accumulation of arrears a separate warrant should issue for each separate breach, and if a single warrant is issued in respect of several breaches, a procedure which Straight J. regarded as an informality but which Oldfield J. appears to have regarded as a legitimate proceeding, the term of imprisonment should not exceed one month. In the case of *Allapichai Ravuther v. Mohidin Bibi*¹, Subramania Ayyar J. and Davies J. disagreed with the Allahabad decision, pointing out that section 488 of the Indian Criminal Procedure Code varied considerably from the terms of section 316 of the former Criminal Procedure Code of 1861, which contained the law relating to maintenance orders and which section 488 of the present Code replaced, and they held in emphatic terms that the maximum term of imprisonment which could be imposed would be one month for each month's arrears. In *Bhiku Khan v. Zahuran*², Hill and Stevens JJ. were of the same opinion as the Madras Bench, and Addison J. in *Emperor v. Sadar Muhammad*³, and Broadway J. in *Emperor v. Budhu Ram*⁴, were of the opinion that the correct interpretation of section 488 was that which was laid down in the Madras and Calcutta cases above mentioned. On the other hand, Hartnoll Offg. C.J. and Ormond J. in *Zaw Ta v. Emperor*⁵, were of the opinion that one month's imprisonment only could be passed in respect of one month's arrears or an accumulation of several months' arrears, but with due respect to those learned Judges I find their reasoning somewhat involved and it does not commend itself to me, for it seems to me that the meaning to be preferred is that which, if I may so express it, leaps to the eye, and that is that for each month's breach (and the word "each" in its simplest connotation has the meaning of separate identity) a month's imprisonment can be awarded. That interpretation also seems consonant with reason since otherwise a defaulter in respect of several months would be in no worse position than a defaulter in respect of one month only, since, as I have said above, the Ordinance clearly contemplates the issue of one warrant in respect of more than one breach of a Magistrate's order.

Counsel for the appellant, however, contends that if a woman in whose favour a maintenance order has been made against her husband, permits him to fall into arrears and takes no proceedings until an accumulation of arrears, she ought, to use his own words, to suffer for her negligence. But this does not explain why the Ordinance seems to contemplate proceedings on an accumulation of arrears. And why should it be presumed that an omission to proceed in respect of the first breach is due to negligence, when this may be due to forbearance out of sentiment or may be due to persuasion by fair promises ultimately unfulfilled.

In my opinion this appeal should be dismissed.

MAARTENSZ J.—I agree.

Affirmed.

¹ *I. L. R. 20 Mad. 3.*

² *I. L. R. 25 Cal. 291.*

³ (1935) *A. I. R. Lahore 758.*

⁴ (1919) *A. I. R. Lahore 197.*

⁵ (1914) *A. I. R. Lower Burma 163 (2).*