1951 *Present:* **Pulle J.**

CADER, Appellant, and AMARASEKERA (S. I. Police), Respondent

S. C. 1,246—M. C. Colombo, 21,365

Sentence—Registered criminal—Measure of punishment—Prevention of Crimes Ordinance (Cap. 18), s. 6.

The mere fact that an offender has a record of several previous convictions is not in itself sufficient reason for imposing a heavy sentence. In passing sentence regard must first be had to the intrinsic nature of the offence proved.

Quaere, whether a Magistrate, when he imposes enhanced punishment under section 6 of the Prevention of Crimes Ordinance, should also pass in every case a sentence other than imprisonment.

Pillai v. Sirisena (1945) 47 N. L. R. 187 doubted.

APPEAL from a judgment of the Magistrate's Court, Colombo. No appearance for the accused appellant.

J. W. Subasinghe, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 18, 1951. PULLE J.—

The appellant was convicted of stealing from a dwelling house a sarong and a shirt valued at Rs. 11.50. He was sentenced, in view of his previous convictions, to pay a fine of Rs. 10 in default ten days' imprisonment and to undergo a further two years' imprisonment and two years' police supervision. He appeals from both the conviction and sentence.

The conviction is plainly right and must be affirmed. The appellant complains that the sentence is excessive. That brings me to the questions:

(*a*) whether the sentence of fine, being on the face of it legal, was one imposed in the exercise of the learned Magistrate's discretion, and

(*b*) whether the award of the maximum terms of two years' imprisonment can, in the circumstances of this case, be justified.

The provision of law under which the appellant was dealt with is section 6 of the Prevention of Crimes Ordinance (Cap. 18), as amended, and it reads as follows:—

> " If any person who has previously twice or oftener been convicted of any crime and has been sentenced on such conviction or convictions to undergo rigorous imprisonment exceeding in the aggregate one year is again convicted of a crime before the Supreme Court or before a District Court or a Magistrate's Court such court, in any case in which it would not otherwise have jurisdiction so to do, shall have jurisdiction, anything in the Criminal Procedure Code, the Penal Code or any other Ordinance to the contrary notwithstanding, 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 ".

It is clear to me that the sentence of fine was not imposed in the exercise of the learned Magistrate's discretion but as a matter of legal compulsion following on the interpretation placed on section 6 by Soertsz A.C.J., in the case of *Pillai v. Sirisena*[1]. In the case cited the appellant was sentenced by a Magistrate, upon a conviction for a crime, under section 6 to two years' imprisonment and two years' police supervision. In appeal an additional punishment in the form of a fine of Rs. 10 was imposed because, to quote the words of the judgment, " section 6 makes it a condition precedent to the imposition of the enhanced punishment provided for by that section that the Magistrate should pass a sentence other than imprisonment in respect of the offence charged. " That the Legislature intended by section 6 that an offender convicted of a crime should either

[1] *(1946) 47 N. L. R. 187.*

be fined or ordered to be whipped before a substantive sentence of imprisonment in excess of the ordinary punitive jurisdiction of a Magistrate could be imposed is antecedently improbable. If, however, the words compel an interpretation of section 6 such as the one placed on it by Soertsz A.C.J., it ought to prevail, however purposeless it may be to saddle a reconvicted criminal with the liability to pay a token fine or serve a further period of a few days after he has served the substantive term of imprisonment.

I venture with due respect to doubt the correctness of the ruling in *Pillai v. Sirisena* [1]. Prior to the amendment of section 6 in 1938 a Magistrate had no jurisdiction to try a registered criminal for a crime triable summarily beyond the stage of the prosecution. If a case was not made out he was acquitted. Otherwise, he was committed for trial after non-summary proceedings. This cumbersome procedure was abandoned and Magistrates were given, speaking generally, the same powers of punishing with imprisonment as District Judges. Magistrates while empowered to punish with imprisonment up to two years could not impose a fine in excess of Rs. 100. In other words section 6 conferred on Magistrates an extraordinary jurisdiction as to the limits of the substantive term of imprisonment for a crime and the words, " in addition to any punishment other than imprisonment to which he may be liable " preserved the ordinary jurisdiction to impose punishment other than imprisonment which the law permits. I am unable to read section 6 as a mandatory provision requiring Magistrates to impose the maximum term of two years on a registered criminal or to impose a fine as a condition precedent to punishing him with imprisonment for two years or a lesser term. Cases can be visualised in which a registered criminal may be adequately punished without invoking the special punitive powers conferred by section 6.

For the purpose of disposing of the case under appeal it is not necessary for me to go so far as to state that I would prefer not to adopt the ruling in *Pillai v. Sirisena* [1]. As, however, Crown Counsel informs me that there have been cases in which the ruling has not been followed, it appears to be desirable to obtain an authoritative decision from a Divisional Bench.

The appellant has an unenviable list of fourteen convictions commencing from 1940. His record is that of a petty thief. In 1945 for theft of rice valued at Rs. 25 he was sentenced to two years' imprisonment and two years' police supervision. In 1949 he was again sentenced to two years' imprisonment and two years' police supervision for theft of articles worth Rs. 12.50. Previous to 1945 he had served terms aggregating to a little over two years. It is, therefore, apparent that the appellant had more than expiated the offences he had committed. Two of the sentences were positively harsh. Can the maximum sentence of two years' imprisonment for theft of clothes valued at Rs. 11.50 be justified in this case? I asked learned Crown Counsel what might have been a fair sentence, if the value of the stolen clothes had been Rs. 100. He had to admit that the learned Magistrate could not then have imposed a heavier sentence. The antecedents of an offender

[1] *(1946) 47 N. L. R. 187.*

are undoubtedly relevant in assessing sentence but, however numerous the previous convictions may be, regard must first be had to the intrinsic nature of the offence.

In the case of *Arthur Baker* [1] the prisoner was sentenced to five years' penal servitude for obtaining £2 by false pretences. The Court of Criminal Appeal in England reduced the sentence to six months' hard labour, although he had several previous convictions for obtaining money by false pretence and for forgery. Avory J. said, " With regard to the sentence, as the Court has frequently said, whatever may be the appellant's character, regard must always be had to the nature of the offence. He must not be sentenced to penal servitude merely because he has been sentenced before ". A similar observation was made in *Ernest Douglas* [2]. The case of *Oliver Taylor* [3] is instructive because the appellant had as many as twenty previous convictions. He pleaded guilty to the charge of stealing a woman's coat from a lobby leading to the office where she was employed and was sentenced to three years' penal servitude. The Lord Chief Justice said, " It has been said over and over again in this Court that the mere fact that a man has been convicted many times is not in itself sufficient reason for passing a heavy sentence on him for an offence which is trivial in itself. The Court is satisfied that the proper sentence here is one of twelve months' imprisonment with hard labour ". In reducing a sentence of five years' penal servitude to nine months' imprisonment with hard labour the Lord Chief Justice said in *Alfred Thomas Woodward* [4], " This Court has said again and again, and now repeats, that in passing sentence regard must be had to the intrinsic nature of the offence proved. It is entirely wrong to send a man to a long term of imprisonment or penal servitude merely because he has received heavy punishment at some other time for some other offence ". I do not think that any further citations are necessary to bring home the principle, which has the quality of being both just and merciful, in dealing with a class of offenders who for want of proper institutions in this country to train them to earn an honest livelihood again fall into the temptation of petty thieving to support themselves.

For the reasons which I have given I am of the opinion that the punitive powers of the learned Magistrate in the exercise of his ordinary jurisdiction were sufficient to deal with the appellant. I would set aside the fine and substitute for the sentence of two years' a sentence of six months' rigorous imprisonment which will begin to run from 4th December, 1951. Subject to the variation in the sentence the appeal is dismissed.

Sentence varied.

[1] *(1916) 11 Cr. A. R. 175.*
[2] *(1916) 11 Cr. A. R. 185.*
[3] *(1925) 18 Cr. A. R. 143.*
[4] *(1930) 21 Cr. A. R 137.*