

[TYSER, C.J. AND FISHER, J.]

POLICE
v.
SALIH JEMALI.

TYSER, C.J.
&
FISHER, J.
1919
February 22

CRIMINAL PROCEDURE—MAGISTERIAL COURT—CONSECUTIVE SENTENCES—JURISDICTION—CRIMINAL LAW AND PROCEDURE AMENDMENT LAW, 1886, SEC. 33—O.P.C., ART. 26.

S. J. was brought before a Magisterial Court on nine charges of theft. He pleaded guilty to all of them, and was sentenced to six months imprisonment in respect of one, to three months imprisonment, to run from the expiration of the said six months, in respect of another, and to three months imprisonment in respect of each of the remaining seven charges, the first of such terms (of which two were concurrent) to run from the expiration of the first mentioned term of three months, making an aggregate of two years and three months.

HELD: (*On an application under Sec. 19 of the Criminal Law and Procedure Amendment Law, 1914, to enquire into the above convictions and sentences, other than the first two*): *That the convictions and sentences, other than the first two, must be set aside.*

SEMBLE: *That the effect of Sec. 33 of the Criminal Law and Procedure Amendment Law, 1886, read with Art. 26 of the Ottoman Penal Code is that, subject to acting otherwise within its powers a Court can order a sentence to run from the expiration of a sentence which the accused is actually undergoing, but that in all other cases the sentence must run from a date not later than the day on which it is pronounced R. v. Martin, 1911, 2 King's Bench, 450 considered.*

The facts appear in the head-note.

Triantafyllides for the Applicant referred to *Regina v. Thomas Castro*, L.R., 6 Appeal Cases, p. 229, and to *Police v. Hussein Zeibek*, C.L.R., X., p. 126.

The King's Advocate for the Prosecution, expressed his inability to resist the application in view of Sec. 33 of the Criminal Law, 1886.

Judgment: In this case the applicant was sentenced by a Magisterial Court to five sentences, the four last to run consecutively, making an aggregate term of imprisonment for two years, a punishment considerably in excess of what a Magisterial Court has power to inflict.

Application is now made to set aside all but the first two. The King's Advocate did not resist the application and it is clear that the last three terms cannot stand. Under Art. 26 of the Ottoman Penal Code no sentence could be ordered to begin from a later day than the day on which the sentence is pronounced. This was altered by Sec. 33 of the Criminal Law and Procedure Amendment Law, 1886, which provided that "where a person convicted of any offence is, while undergoing

TYSER, C.J. " sentence on such conviction, convicted of another offence, the Court
 &
 FISHER, J. " before which he is convicted of the last-named offence may direct
 " that the sentence therefore take effect at any subsequent time not
 POLICE " later than the expiration of the sentence which the convict is under-
 v. " going at the time of his subsequent conviction, and the sentence shall
 SALIH " take effect accordingly."
 JEMALI

It cannot be said even by any straining of the meaning of the words of the section that the applicant was undergoing sentence on the second conviction at the time the third sentence was passed. No question as to the second sentence is raised here, and in cases where an accused person is convicted of two charges at the same hearing it has been the practice for a number of years to pass a second sentence to run from the termination of the first. This practice may be justifiable on a construction of Sec. 33 analogous to that put by the Court of King's Bench in *Rex v. Martin*, L.R., 1911, 2. K.B., 450 on a similar enactment. In that case the Court held that justices before whom a defendant was at the same time convicted of several distinct offences had jurisdiction to pass two sentences to run consecutively but no more. The judgment was based on Sec. 25 of the Summary Jurisdiction Art. 1848, which provides that a sentence to run from the expiration of another may be passed where the defendant is " in prison undergoing imprisonment " upon a conviction for any other offence," and the Court held that from the pronouncement of the first sentence the defendant must be taken to be " in prison undergoing imprisonment " upon it and that, therefore, the second sentence could run from the expiration.

LORD ALVERSTONE, C.J., in giving judgment said, in commenting on a previous case which the judgment in the case of *Rex v. Martin* followed, ". . . a man may be said to be in prison undergoing imprisonment as soon as he is convicted on the first charge and sentenced to imprisonment under it, his liberty being thereby restrained although he is not actually in prison."

Although that does not indeed appear to me to be the natural construction of the language, as it has been acted upon now for over forty years, I do not think we ought to interfere with the practice so far as it allows the imposition of a second sentence to commence from the expiration of the first. It may be, therefore, that Sec. 33 applies where a man, having been sentenced for an offence and, therefore, from that moment undergoing a sentence, stands convicted of another offence, although he has actually been found guilty of it prior to the sentence, but subsequent to his being found guilty on the first charge. It would seem that the practice obtaining may be found on some such reasoning.