APPELLATE CRIMINAL.

Before Mr. Justice E Maung.

MA MYA SEIN (APPLICANT)

v.

THE KING (RESPONDENT).*

1947

Sept. 23.

Cognizance of an offence—S. 190 (a) (b) *of Code of Criminal Procedure—Report of a non-cognizable offence by a Police Officer—Ss. 11* (a) *and 11* (b) *and 15 of Suppression of Brothels Act.*

Held : That after the amendment of the Code of Criminal Procedure in 1923, a Magistrate under s. 190 (*b*) of the Code can take cognizance of an offence upon a report in writing of such facts made by any Police Officer whether the facts constitute a cognizable or non-cognizable offence.

Bhairab Chandra Barua v. *Emperor*, 46 Cal. 807 ; *The Public Prosecutor* v. *Ratnavelu Chetty*, I.L.R. 49 Mad. 525, followed.

Under s. 15 of the Suppression of Brothels Act only, a Police Station Officer or officer higher than a Sub-Inspector was entitled to enter a brothel for ascertaining whether an offence under s. 11 has been committed. In the present case the entry was by a Sub-Inspector but such illegal entry does not vitiate the proceedings if the Magistrate takes cognizance under the report of the Police.

Emperor v. *Chandri Bawoo*, 26 Bom. L.R. 1225, dissented from.

Maung San Myin v. *King-Emperor*, I L.R 7 Ran. 771 ; *Chwa Hum Htive* v. *King-Emperor*, I.L.R 11 Ran. 107 ; *Aung Kim Sein* v. *The King*, (1941) Ran. 552, followed.

S. 11 (*a*) of the Suppression of Brothels Act penalizes a person who keeps or manages or assists in the management of a brothel—as the report does not make any such allegations and the report simply suggests prostitution by some women, no offence under the Act is disclosed.

Leong for the applicant.

Tin Maung for the respondent.

E MAUNG, J.—These four proceedings arose out of Criminal Regular Trial No. 236 of 1947 of the Court of the 3rd Additional Magistrate, Rangoon, instituted on a report in writing by the Station Writer, Latter Street Police Station, on the 27th May 1947. Four persons

* Criminal Revisions Nos. 137B, 211A, 212A and 213A of 1947 being review of the 3rd Additional Magistrate of Rangoon—order passed in Criminal Regular Trial No. 236 of 1947.

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were sent up for trial under sections 11 (*a*) and 11 (*b*) of the Suppression of Brothels Act. Ma Mya Sein, who is the applicant in Criminal Revision No. 137B of 1947, was charged with an offence under section 11 (*b*) and the three respondents in Criminal Revision Nos. 211A, 212A and 213A of 1947 were charged with offences under section 11 (*a*) of the said Act.

It is necessary to reproduce here the report thus made. It runs as follows :

"On 26-5-47, at about 8-45 p.m. while making rounds in the jurisdiction along with P.C. Mg. Myint of Latter Street P.S. and villagers Chit Aung and Than Pe, visited Soon Ngon Hun lodging room, 19th street whereby found Mg. Tun Lwin and Ma Than Kyi in a room, Ah Mya and one unknown Indian, Ma Khin Kyi with Chinaman Ah Kun. Brought all the mentioned persons and on being questioned they replied that they are engaged by the said persons for sexual intercourse getting Rs. 25, Rs. 60 and Rs. 30 respectively. Therefore, the said women are arrested to take action under 11 (*a*) S.B. Act. Ma Mya Sein, lodging room keeper was also arrested for taking action under 11 (*b*) S.B. Act."

On this report, which was sent by the District Magistrate, Rangoon, to the 3rd Additional Magistrate, Rangoon, cognizance was taken against the four persons named and after one witness for the prosecution had been examined Dr. Maung Thein, who appeared for Ma Mya Sein, raised a preliminary objection. He contended that since an offence under section 11 of the Suppression of Brothels Act is a non-cognizable offence and since section 15 of the Act enables only a police officer in charge of a police station or an officer above the rank of Sub-Inspector of Police, to enter without a warrant any premises for the purpose of ascertaining whether an offence under section 11 of the Act has been or is being committed, the prosecution initiated on the report in writing, above referred to, is incompetent.

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This objection was rejected by the learned trial Magistrate and Ma Mya Sein has come up in revision to this Court. After hearing her counsel as to admission, I considered it desirable in the interests of justice to have all the accused persons before this Court and directed the opening of revision proceedings in respect of the other three accused, namely, Ah Mya, Ma Than Kyi and Ma Khin Kyi. I have since heard Mr. Leong for Ma Mya Sein and U Tin Maung, Government Advocate, on behalf of the Crown. Ah Mya and Ma Khin Kyi, who appeared in person, had nothing to say. Ma Than Kyi was absent at the hearing though she had been served.

Mr. Leong's sheet anchor was a decision of the Bombay High Court in *Emperor* v. *Chandri Bawoo* (1). He also cites a decision of this Court in *Jagdeo Panday* v. *N. C. Hill* (2) in support. His contention, if I understand him right, is that the report in writing in this case, being made in respect of an offence not cognizable by the police (the maximum penalty provided for an offence under the Act being imprisonment for one year or a fine of Rs. 1,000), the police could not investigate into the offence except under the direction of a Magistrate. He further says that under section 15 of the Act, only a police officer in charge of a police station or an officer holding rank higher than that of a Sub-Inspector of Police is competent to make an enquiry but that in this case the officer who entered into the premises for the purpose of ascertaining whether an offence under section 11 of the Act has been committed or was being committed, was only of the rank of a Sub-Inspector of Police, and that the illegal entry would, as was laid down in similar circumstances in the Bombay case, vitiate the subsequent prosecution.

(1) 26 Bom. L.R. 1225. (2) (1938) Ran. 150.

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Section 190 (*b*) of the Criminal Procedure Code allows a Magistrate to take cognizance of any offence upon a report in writing of such facts made by any police officer. Prior to the amendment of this section in 1923, clause (*b*) read : " Upon the police report of such facts." There was then a conflict of judicial interpretation on the words " the police report ", certain Courts taking the view that the police report must refer necessarily to cases where the police can take cognizance and other Courts the view that the police report could be in respect of non-cognizable offences as well. To clear up the matter the amendment was made by Act VIII of 1923 and it has been consistently held since that the effect of the amendment is to enable a Magistrate to take cognizance on a report in writing made by a police officer, whether the facts constitute a cognizable offence or a non-cognizable one. The matter is so very obvious that authorities are hardly necessary. I need only mention two decisions here in support : *Bhairab Chandra Barua* v. *Emperor* (1) and *The Public Prosecutor* v. *Ratnavelu Chetty* (2). It is therefore against this background that I have to consider the applicability of the Bombay decision in *Emperor* v. *Chandri Bawoo* (3) to the facts of the present case. At page 1230 of that report Marten J. said :

> " I am certainly not inclined to stretch a point and hold that the arrest, though illegally made, did not affect the powers of the Magistrate subsequently to hear the case."

Section 10 (*1*) of the Bombay Prevention of Prostitution Act corresponds in essence to section 14 of the Burma Act. The arrest in the Bombay case was made by an unauthorized police officer without the necessary complaint being made to him and the arrest was therefore, in that case, an illegal arrest. It is true that in

(1) 46 Cal. 807. (2) I.L.R. 49 Mad. 525.
(3) 26 Bom. L.R. 1225.

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the case before me also, if the entry into the premises was made by U Nyunt Din and his subordinates only, there was in the party no one superior in rank to that of a Sub-Inspector of Police. The entry therefore would be an illegal one and if I can agree with Marten J. that an illegal entry would vitiate a subsequent prosecution, the application of Ma Mya Sein must be allowed. In support of his view that an illegal arrest would vitiate the consequent prosecution, the learned Judge said at page 1229 of the report :

" It is a new Act, and, as I read s. 10, it has been deliberately inserted so as to afford reasonable protection to the public. An ordinary police constable is not to be allowed to arrest any female in a street unless a complaint has been made to him of her conduct, and unless he himself sees the offence committed, and he cannot discover her name and address. Or, on the other hand, the constable must be athorized by the Commissioner of Police by a special order to effect an arrest of this description, and one can quite understand the reason for this, *viz.* to ensure that mistakes should not be made and that some innocent woman should not be dragged off to prison or put under arrest in the public street by any ordinary police constable.

One knows that mistakes of that kind by the police in England have led to strong public criticism. I remember in particular many years ago one case at Cambridge where a mistake of that nature by the University Proctors led to interference by Parliament and a public enquiry, as a result of which the jurisdiction of the University authorities to arrest women in the streets on an accusation of soliciting was taken away from them altogether."

With respect, I find myself unable to agree with Marten J. A Judge has to administer the law as he finds it: He may not stretch the law either in favour of the accused or in favour of the prosecution, upon grounds of public morals or public expediency. It is for the Legislature to say, if it is so advised, that to ensure that mistakes are not made no police officer below a certain rank should be competent to institute

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criminal proceedings. This in the case of the Burma Act the Legislature has not done. The decisions of this Court in *Maung San Myin* v. *King-Emperor* (1), *Chwa Hum Htive* v. *King-Emperor* (2) and *Aung Kim Sein* v. *The King* (3) are clearly against the view taken by Marten J. in the Bombay case. Fawcett J. in the same case proceeded on the application of the special provisions of the Bombay City Police Act. This Act is not before me but at page 1231 of the report Fawcett J. stated "that valid report by a police officer in the town of Bombay of the kind contemplated by clause (*b*) of section 190 can only be made (i) in the case of a non-cognizable offence and (ii) when it contains information of a cognizable offence which he has been authorized by a Presidency Magistrate to investigate." There is no provision in the Burma Act to correspond.

In these circumstances, I consider that the application of Ma Mya Sein to be premature and accordingly reject it.

Coming to the case of the three other women Ah Mya, Ma Than Kyi and Ma Khin Kyi, who have each been charged with an offence under section 11 (*a*) of the Suppression of Brothels Act, I do not see any offence either under that section or any other provisions of the Act, made out against them on the facts stated in the report in writing before the trial Court. The Court taking cognizance, whether under clause (*a*) or clause (*b*) or clause (*c*) of section 190 of the Criminal Procedure Code must proceed either on a complaint or a report or information of facts which constitute an offence. The learned Magistrate had before him a report stating certain facts as far as these persons are concerned and the facts alleged against them were that Ah Mya was found with an unknown Indian in a bedroom, Maung

(1) I.L.R. 7 Ran. 771. (2) I.L.R. 11 Ran. 107.
(3) I.L.R. (1941) Ran. 552.

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Tun Lwin and Ma Than Kyi in another bedroom and Ma Khin Kyi and a Chinaman in a third, and that on enquiry the three men said that each of them was in the company of the respective woman for the purpose of sexual intercourse having paid Rs. 60, Rs. 25 and Rs. 30 respectively for the services of the woman. Accepting these facts to be true, as I must for the purpose of the revision proceedings in hand, what offence do they disclose? They certainly do not disclose an offence under section 11 (*a*) of the Suppression of Brothels Act which penalizes a person who keeps or manages or assists in the management of a brothel. Neither do the facts bring the women under the provisions of section 4 of the Act. There is no question here of soliciting or molesting for the purpose of prostitution. There is no question also at these three women attracting or endeavouring to attract the attention of any one for the purpose of prostitution. All that the facts would establish are that these three women are prostitutes and that they were present in the premises entered by the police officers carrying on the business of prostitution. It may or may not be desirable to make prostitution penal. On that I say nothing; it is beyond my province as a Judge. But as the law now stands, prostitution as such is not a criminal offence and these three women against whom no fact has been alleged which would constitute a criminal offence, must be discharged from the case. I accordingly direct their discharge.