APPELLATE CRIMINAL.

Before U San Maung, J.

MAUNG NYEIN MAUNG AND ONE (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1948

Feb. 9.

Criminal Procedure Code, ss. 190 (1) (a) (c), 235 (1)—Cognizance of offence under joinder of charges— Ss. 302 and 323 of Penal Code.

Held: That when case is sent for trial under s. 302 of Penal Code and the Special Judge after hearing the evidence frames charges under ss. 302 and 323 of the Penal Code, he takes cognizance of the offence punishable under s. 323 and under s. 190 (1) (*a*) and not 190 (1) (*c*) of the Code of Criminal Procedure and therefore s. 191 of the Code does not come into operation.

Abdul Rahman v. *K.E.*, I.L.R. 5 Ran. 53 (P.C.); *Baldeo Prasad* v. *K.E.*, I.L.R. 12 Pat. 758, followed.

Under s 235 (1) of the Code of Criminal Procedure joinder of two charges under ss. 302 and 323 of the Penal Code is justified because both the offences arose out of series of acts so connected together as to form part of the same transaction.

U SAN MAUNG, J.—The appellants Nyein Maung and Maung Kywe were two convict warders of Tharrawaddy Jail who have been prosecuted by the police for the alleged murder of a prisoner by the name of Chit Sein who was an inmate of cell No. 7 of a series of eight cells which were known as Punishment Cells, the principal witness for the prosecution being Maung Tin (P.W. 3) who was the inmate of the adjacent cell No. 8. Cognizance of the offence was taken in a police report which only mentioned about the fact of murder and not of the assault on Maung Tin (P.W. 3). The learned Special Judge, Tharrawaddy, however, framed charges under section 323 of the Penal Code against the appellants for causing hurt to Maung Tin, in addition to the charges under section 302 of the Penal Code for the alleged murder

* Criminal Appeal No. 2067 of 1947 arising out of Criminal Regular Trial No. 21 of 1947 of the Special Judge, Tharrawaddy.

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of Chit Sein. Eventually he acquitted the appellants of the charges of murder, but convicted them of the offence of causing hurt to Maung Tin and sentenced each of them to rigorous imprisonment for eight months. This appeal was mainly admitted to consider—

(1) whether the joinder of charges of murder in respect of Chit Sein and of simple hurt to Maung Tin is permissible in law, and

(2) whether the learned Judge has taken cognizance of the offences under section 323 of the Penal Code under clause (*c*) of sub-section (1) of section 190, Criminal Procedure Code, so as to attract the provisions of section 191 of the Code.

The case for the prosecution was that Maung Tin and Chit Sein who were considered to have been in joint possession of rifle cartridges were assaulted by the two appellants in quick succession inside the two adjacent cells in order to have further information extracted from them, and that while Maung Tin got off with minor injuries Chit Sein died as a result of the injuries received. Therefore, what the prosecution was attempting to prove by the evidence of Maung Tin (P.W. 3) and by other circumstantial evidence was that the murder of Chit Sein took place in course of the same transaction as the assault on Maung Tin. Therefore the joinder against each of the two appellants of the charges under section 302 of the Penal Code and section 323 of the Penal Code is justified under sub-section (1) of section 235 of the Criminal Procedure Code. The fact that after a review of the whole of the evidence in the case, the learned trial Judge acquitted each of the appellants for the offence under section 302 of the Penal Code does not alter the case.

As regards the second question, it is clear that when a Judge or Magistrate takes cognizance under clause (*b*) of section 190 (1), Criminal Procedure Code, he takes cognizance of an offence and not of the person charged in the report as the offender. Therefore, it does seem at first sight that in this case, cognizance was only taken of the offence of murder since that was the only offence mentioned in the police report. However, in the case of *Abdul Rahman* v. *K.E.* (1) it was held that a Magistrate in formulating against the appellant, after hearing the evidence, a new charge in place of one originally framed, was acting under clause (*a*), not clause (*c*) of section 190, sub-section (1), of the Code and that section 191 did not apply. In the case of *Baldeo Prasad* v. *K.E.* (2) it was held that when the Magistrate has before him a police report disclosing one offence of which he takes cognizance and if in the course of taking evidence a different offence is disclosed and he takes cognizance of it, he would be deemed to have taken cognizance of the latter offence, not under clause (*c*) of section 190 (1), but under clause (*b*).

I can see no difference in principle, between the case cited above and the present, where the learned Special Judge took cognizance against the appellants of an *additional* offence under section 323 of the Penal Code which he considered them to have committed in course of the same transaction as the offence under section 302 of the Penal Code.

The convictions of the appellants under section 323 of the Penal Code are amply supported by the evidence adduced. In fact the appellants do not now deny having assaulted Maung Tin. The sentences call for no interference.

Appeals dismissed.

(1) I.L.R. 5 Ran. 53 (P.C.). (2) I.L.R. 12 Pat. 758.